63D CONGRESS, 1st Session } SENATE { DOCUMENT No. 43

INSURRECTION AND MARTIAL LAW

OPINIONS

OF THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA IN THE CASES OF STATE EX REL. MAYS *v.* BROWN, WARDEN OF STATE PENITENTIARY, STATE EX REL. NANCE *v.* SAME

AND

IN RE MARY JONES, CHARLES H. BOSWELL, CHARLES BATLEY, AND PAUL J. PAULSON

WASHINGTON
GOVERNMENT PRINTING OFFICE
1913

IN THE SENATE OF THE UNITED STATES,
May 14, 1913.

Ordered, That the opinion of the Supreme Court of Appeals of West Virginia, December 19, 1912, in the case of "State ex rel. Mays *v.* Brown, warden of State Penitentiary," "State ex rel. Nance *v.* Same," together with the pamphlet, "In the Supreme Court of Appeals of West Virginia, In re Mary Jones, In re Chas. H. Boswell, In re Charles Batley, In re Paul J. Paulson," be printed as a public document.

Attest:

JAMES M. BAKER,
Secretary.

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STATE EX REL. MAYS v. BROWN, WARDEN OF STATE PENITENTIARY.

STATE EX REL. NANCE v. SAME.

(Supreme Court of Appeals of West Virginia. Dec. 19, 1912.)

(*Syllabus by the Court.*)

1. Insurrection (Sec. 5[1])—Martial Law—Declaration—Power of Governor.
The governor of this State has power to declare a state of war in any town, city, district, or county of the State in the event of an invasion thereof by a hostile military force, or an insurrection, rebellion, or riot therein, and in such case to place such town, city, district, or county under martial law.

[Ed. Note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5.[1]]

2. Insurrection (sec. 5[1])—State Sovereignty—Constitutional Guaranties—Habeas Corpus.
The constitutional guaranties of subordination of the military to the civil power, trial of citizens for offenses cognizable by the civil courts in such courts only, and maintenance of the writ of habeas corpus are to be read and interpreted so as to harmonize with other provisions of the Constitution authorizing the maintenance of a military organization, and its use by the executive to repel invasion and suppress rebellion and insurrection, and the presumption against intent on the part of the people, in the formulation and adoption of the Constitution, to abolish a generally recognized incident of sovereignty, the power of self-preservation in the State by the use of its military power in cases of invasion, insurrection, and riot.

[Ed. Note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5.[1]]

3. Constitutional Law (sec. 68[1])—Declaration—Review by Courts.
It is within the exclusive province of the executive and legislative departments of the Government to say whether a state of war exists, and neither their declaration thereof nor executive acts under the same are reviewable by the courts while the military occupation continues.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig., secs. 125–127; Dec. Dig., sec. 68[1]]

4. Insurrection (sec. 5[1])—Military Commission—Trial of Offense.
The authorized application of martial law to territory in a state of war includes the power to appoint a military commission for the trial and punishment of offenses within such territory.

[Ed. Note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5[1].]

5. Insurrection (sec. 5[1])—Martial Law—Power of Courts.
Martial law may be instituted in case of invasion, insurrection, or riot in a magisterial district of a county, and offenders therein punished by the military commission notwithstanding the civil courts are open and sitting in other portions of the county.

[Ed. Note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5[1].]

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[1] For other cases see same topic and section number in Dec. Dig. and Am. Dig. Key-No. Series and Rep'r Indexes.

6. Insurrection (sec. 5[1])—Martial Law—Military Commission—Offenses. Acts committed in a short interim between two military occupations of a territory for the suppression of insurrectionary and riotous uprisings and such in their general nature as those characterizing the uprising are punishable by the military commission within the territory and period of the military occupation.

[Ed. Note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5[1].]

Robinson, J., dissenting:

Habeas corpus by the State on relation of L. A. Mays, and on relation of F. S. Nance, to secure relator's release from custody of M. L. Brown, warden of the State penitentiary. Writs denied.

Belcher, Stiles & Goettman, for petitioner. William G. Conley, attorney general; George S. Wallace, acting judge advocate general, of Charleston; and J. O. Henson, assistant attorney general, for respondent.

Poffenbarger, J. L. A. Mays and S. F. Nance, in the custody of M. L. Brown, warden of the penitentiary of this State, under sentences of a military commission appointed by the governor to sit in a territory corresponding in area and boundaries with the magisterial district of Cabin Creek, in the county of Kanawha, in which the said governor had declared a state of war to exist, by proclamation duly issued and published, seek discharges and liberation upon writs of habeas corpus duly issued by this court. Upon these writs, lack of authority in the governor to institute, in cases of insurrection, invasion, and riot, martial law is denied in argument. A further contention is that his power to do so extends only to the inauguration or establishment of a limited or qualified form of such law, subordinate to the civil jurisdiction and power to a certain extent, and certain provisions of the State constitution are relied upon as working this restraint upon the executive power, among them the provision of section 4 of article 3, saying, "The privilege of the writ of habeas corpus shall not be suspended," and the provision of section 12 of the same article, saying, "The military shall be subordinate to the civil power, and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court for any offense that is cognizable by the civil courts of the State." A minor question is whether offenses committed immediately before the proclamation of martial law, but connected with the insurrection and operative therein, may be punished by a military commission acting within the period of martial occupation and rule.

All agree as to the character and scope of martial law, unrestrained by constitutional or other limitations. The will of the military chief, in this instance the governor of the State, acting as commander in chief of the army, is subject to slight limitations, the law of the military zone or theater of war. It is sometimes spoken of as a substitute for the civil law. It is said also that the proclamation of martial law ousts or suspends the civil jurisdictions. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends, and nullifies the actual operation of the constitution and laws. The guaranties of the constitution, as well as the common law and statutes and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection and declares it. In send-

ing the army into such territory to occupy it and execute the will of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the constitution and laws within that territory in obedience to his sworn duty to support the constitution and execute the laws.

(1) This power is a necessary incident of sovereignty. It is necessary to the preservation of the State. Subject to the jurisdiction and powers of the Federal Government, as delegated or surrendered up by the provisions of the Federal Constitution, this State is sovereign and has the powers of a sovereign State. Like all others, it must have the power to preserve itself. Where that power resides and how it is to be exercised are questions about which there has been some difference of opinion among jurists and statesmen. Whether the executive, without legislative authority, may exercise it need not be discussed. Section 92 of chapter 18 of the code confers upon the governor authority to declare a state of war in towns, cities, districts, and counties in which there are disturbances by invasion, insurrection, rebellion, or riot. Moreover, section 12 of article 7 of the constitution itself seems to confer such authority upon the governor, saying he "may call out" the military forces "to execute the laws, suppress insurrection, and repel invasion." Hence we may say the inauguration of martial law in any portion of this State by proclamation of the governor has both constitutional and legislative sanction in express terms.

(2) The provisions against the suspension of the writ of habeas corpus and trial of citizens by military courts for offenses cognizable by the civil courts can not in the nature of things be actually operative in any section in which the constitution itself and the functions of the courts have been ousted, set aside, or obstructed in their operation by an invasion, insurrection, rebellion, or riot. In such cases the constitutional guaranties of life, liberty, and property have ceased to be operative and efficacious. The lives, liberty, and property of the people are at the mercy of the invading, insurrectionary, rebellious, or riotous element in control. Their will and desires, not the constitution and laws, rule and govern. There is no court with power to grant or enforce the writ of habeas corpus within the limits of such territory. There is no court in which a citizen can be tried nor any whose process can be made effective for any purpose. No doubt the constitution and laws of the State are theoretically or potentially operative, but they are certainly not in actual and effective operation. The exercise of the military power, disregarding for the time being the constitutional provisions relied upon, is obviously necessary to the restoration of the effectiveness of all the provisions of the constitution, including those which are said to limit and restrain that power.

To ascertain the extent and purpose of the incorporation of these restrictive provisions of the Constitution they must be read in the light of principles developed by governmental experience in all ages and countries and universally recognized at the date of the adoption of the Constitution and not expressly abolished or precluded from operation by any terms found in the instrument. In the interpretation of contracts, statutes, and constitutional provisions words are often limited and restrained to a scope and effect somewhat nar-

rower than their literal import, upon a presumption against intent to interfere with or innovate upon well-established and generally recognized rules and principles of public policy not expressly abolished. (Railway Co. *v.* Conley & Avis, 67 W. Va., 129, 165, 67 S. E., 613; Reeves *v.* Ross, 62 W. Va., 7, 57 S. E., 284; Brown *v.* Gates, 15 W. Va., 131; Cope *v.* Doherty, 2 Deg. & J., 614; Dillon *v.* County Court, 60 W. Va., 339, 55 S. E., 382.) Nothing can be higher in character or more indispensable than this power of self-preservation. The experience of all civilization has demonstrated its necessity as an incident of sovereignty. In the organization of the State its citizens likely did not intend to omit or dispense with a power vital to its very existence or the maintenance and efficiency of its powers under circumstances which inevitably arise in the life of every State. Hence there is strong ground for a presumption in favor of the retention of the power in question, which finds support in other constitutional provisions, authorizing the maintenance of a military organization and the use of it by the executive in the repulsion of invasion and suppression of insurrections and riots. (Art. 7, sec. 12.) No rebuttal of the presumption nor abolition of this sovereign power is found in any express terms of the Constitution.

The guaranties of supremacy of the civil law, trial by the civil courts, and the operation of the writ of habeas corpus should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. It is reasonable and logical. Otherwise the whole scheme of government may fail. So interpreted, they have wide scope and accomplish their obvious purpose. The attempt to extend them further would be futile and result in their own destruction. The interruption is of short duration. It is only while military government is used as an instrument of warfare that the commander's will is law. (New Orleans *v.* Steamship Co., 20 Wall., 387, 22 L. Ed., 354; Ex parte Milligan, 4 Wall., 2, 127, 18 L. Ed., 281.) That a military occupation of a territory in a state of peace and order differs radically from the prosecution of a war in the same territory is well established. In Ex parte Milligan, cited in the former case, the military is subordinate to the civil power, no matter whether the occupancy under tranquil condition precedes or follows the military operations. Martial law is operative only in such portions of the country as are actually in a state of war, and continues only until pacification. Ordinarily the entire country is in a state of peace, and on extraordinary occasions calling for military operations only small portions thereof become theaters of actual war. In these disturbed areas the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, nor try citizens for offenses, nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But in all the undisturbed, peaceable, and orderly sections the constitutional guaranties are in actual operation and can not be set aside. (Ex parte Milligan, cited.) In most, if not all, of the instances in which the civil courts have treated sentences of military commissions as void the commissions acted and the sentences were pronounced in tranquil territory, not covered by any proclamation

of martial law, in which there was no actual war and in which the Constitution and laws were in full and unobstructed operation. An insurrection in a given portion of a State or an invasion thereof by a foreign force does not produce a state of war outside of the disturbed area. A nation may be at war with a foreign power and yet have no occasion to institute martial law anywhere within its own boundaries, as in the case of the United States in the War with Spain. So, during the Civil War, there were vast areas and whole States in which there was no actual war.

(3) It seems to be conceded that if the governor has the power to declare a state of war his action in doing so is not reviewable by the courts. Of the correctness of this view we have no doubt. The function belongs to the executive and legislative departments of the government and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course, as to the consequences of an arbitrary exercise of this high sovereign power, but the people in the adoption of their constitution may well be supposed to have proceeded upon a well-grounded presumption against any such action and assumed that the evil likely to flow from an attempt to hamper and restrain the sovereign power in this respect might largely outweigh such advantages as could be obtained therefrom. We are not to be understood as saying there would be a lack of remedy in such case. The sovereign power rests in the people and may be exerted through the legislature to the extent of the impeachment and removal from office of a governor for acts of usurpation and other abuses of power.

(4) Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument, but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character. Such insurrections as are likely to occur in a State like this are mild and of short duration. But no man can foresee and foretell the possibilities, and a government must be strong enough to cope with great insurrections and rebellions as well as mild ones.

(5) That the courts of Kanawha County sit within the limits of that county and outside of the military zone does not preclude the exercise of the powers here recognized as vested in the executive of the State. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district at the time of the military occupation and immediately before was such as to preclude the free course and effectiveness of the civil law and the process of the court, however effective they may have been in other sections of Kanawha County. The constitution and laws themselves admit the obvious inadequacy and insufficiency of ordinary process and penalties in cases of insurrection by authorizing military suppression thereof. Participants therein, arrested and committed to the civil authorities, could easily find means of delaying trial, and, liberated on bail, return to the insurrectionary camp and continue to render aid and give encour-

agement by unlawful acts, and demonstration of their ability to do so would itself contribute to the maintenance of the uprising. The civil tribunals, officers, and processes are designed for vindication of rights and redress of wrongs in times of peace. They are wholly inadequate to the exigencies of a state of war incident to an invasion or insurrection. So the legislature evidently regards them, since it expressly authorizes the governor, "in his discretion," to "declare a state of war in towns, cities, districts, and counties." He is not required by any principle of international or martial law, the constitution, or statute to institute it, when proper, by counties. On the contrary, the statute authorizes it as to a town, a city, or a district, and he is not limited to towns, cities, and districts in which the courts sit in times of peace, nor forbidden to put a town, city, or district of a county under martial-law rule by the sitting of courts elsewhere in the county. Section 2 of chapter 17 of the Virginia code of 1860 was the same in principle, authorizing the governor to call forth the militia to suppress combinations for dismembering the State or establishing a separate government in any part of it, or for any other purpose powerful enough to obstruct in any part of the State the due execution of the laws thereof in the ordinary course of proceeding. The Virginia constitutional guaranties were then about the same as ours. "There was a provision against suspension of the writ of habeas corpus in any case." (Art. 4, sec. 15.) In these statutes are found legislative constructions of constitutions harmonizing with the conclusions here stated as to the relation and purposes of the constitutional provisions, and also the power to place a part of a county under martial rule, notwithstanding the courts may be open in some other part thereof.

(6) The offenses for which the petitioners were punished were committed in an interim between two successive periods of martial government. The first proclamation was raised about the middle of October, and the disturbances which had occasioned it immediately broke out again, and these offenses were of the kind and character which had made the occupation necessary. About the middle of November there was a second proclamation of a state of war. Just a few days before this second declaration, these offenses were committed, and the offenders were found within the military zone, and were arrested, tried, and convicted. If the offenses had been wholly disconnected with the insurrection and not in furtherance thereof there might be doubt as to the authority of the military commission to take cognizance of them, although there are authorities for such jurisdiction and power as to any sort of offense committed within the territory over which martial law has been declared and remaining unpunished at the time of the declaration thereof.

We are not reviewing the sentences complained of, nor ascertaining or declaring their legal limits. Our present inquiry goes only to the question of legality of the custody of the respondent at the present time and under the existing conditions. The territory in which the offenses were committed is still under martial rule. It suffices here to say whether the imprisonment is, under present conditions, authorized by law, and we think it is. We are not called upon to say whether the end of the reign of martial law in the territory in question will terminate the sentences, and upon that question we express no opinion.

Upon the facts set forth in the petition, we are of the opinion that the petitioners are in lawful custody, and we therefore remand them to the custody of the respondent.

Petitioners remanded.

ROBINSON, J., dissenting:

The majority opinion boldly asserts that the sacred guaranties of our State constitution may be set aside and wholly disregarded on the plea of necessity. It had long been supposed that such a doctrine was forever condemned and foreclosed in this State. It was believed that the ringing denouncement against that doctrine in the opening sentences of our constitution was sufficient to bar it from recognition by any citizen, official, or judge. The unmistakable words were supposed to be too clear ever to endanger our people by a disregard of their meaning. Hear them:

> The provisions of the Constitution of the United States and of this State are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism. (Art. 1, sec. 3.)

How closely akin are these words to those that were uttered by the Supreme Court of the United States shortly prior to the adoption of our Constitution:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence. (Ex parte Milligan, 4 Wall., 120; 18 L. Ed. 281.)

A decision based on that which our people have so clearly condemned and inhibited from recognition in our State government, and which the highest tribunal in the land has so plainly declared to be pernicious and to have no place in our form of government, meets my emphatic dissent.

It is not difficult to comprehend why our State constitution contains such a clear and unmistakable protest against the disregard of constitutional guaranties under the plea of necessity. During the decade immediately preceding the making and adoption of that instrument, this doctrine of necessity was a live issue before the American people. Indeed, just at the close of the Civil War and immediately thereafter, the doctrine was one of the foremost issues of the times. Events brought it vividly before the nation. Those who applied the doctrine during the war and at its close for the summary trial and execution of noncombatants were met with the accusation of murder from both North and South. Even in one of the counties of this State a citizen was summarily deprived of his life under the plea of military rule and the doctrine that necessity suspended the constitution. Instances of this character, as well as the many instances of imprisonment without civil trial, caused the question to come immediately before the statesmen of the times, and, by the debates upon it, to come directly before all the people. The people had become thoroughly familiar with the subject. Great

men of the North, foremost among them the illustrious Garfield, had thundered against the doctrine. And at last the great judicial tribunal of the Nation had set its seal of condemnation upon it. (Ex parte Milligan, supra.) But even after this, and only two years prior to the assembling of our constitutional convention, the question came again before the country in the celebrated cases in North Carolina, arising from the use of the militia of that State in the suppression of the Ku-Klux Klan. (Ex parte Moore and others, 64 N. C., 802.) These cases, because of the marked clash between the military power and the judiciary, again made the country to notice the question and to observe that the principle of necessity, though denounced by the Supreme Court of the United States, was claimed for the purpose of ignoring the guaranties of a State constitution. And again, in the face of the most stubborn resistance from the executive and military arm of the government of North Carolina the principle that the plea of necessity could deprive one of constitutional trial by jury was rejected, with marked emphasis, in an opinion by the eminent Chief Justice Pearson of that State.

So it was that when our constitutional convention assembled in 1872, the persistent claim that necessity could abrogate a constitutional provision naturally came to be considered. That convention saw, by the recent example in North Carolina, that notwithstanding the condemnation that this doctrine of necessity had received from the greatest and most cautious minds of the country, it was likely still to be claimed in State government. Hence, the strong men of that convention deemed it essential to make clear pronouncement against such a doctrine ever finding hold in West Virginia. They had become fully advised about the question by having been face to face with it. The people who approved and ratified the constitution were advised by the same experience. They hated the doctrine that a constitution might be set aside or declared inoperative at the will of an official created by that constitution itself, as all lovers of constitutional government hate such a doctrine. Therefore, as a part of their compact of government, they adopted the forceful declaration against abrogating the guaranties of that compact at any time on the plea of necessity. Let us again bring that declaration to mind:

> The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof, under the plea of necessity or any other plea, is subversive of good government and tends to anarchy and despotism.

Can there be any mistake about the meaning of these words? Were they put in the constitution for mere sound? No; they were put there to bind—to be sacredly kept.

Martial law can not rightly be sanctioned in West Virginia in the face of this constitutional declaration. For, as the majority opinion admits, martial law is a departure from the constitution, a plain violation thereof, under the plea of necessity. It substitutes the law of a military commander for the law of the constitution. It is the total abrogation of orderly presentment and trial by jury, so jealously guarded by the constitution. Then, since martial law is such a plain departure from the constitution, that instrument itself brands martial law as subversive to good government and as tending to anarchy.

Having made this general declaration against martial rule, the makers of our constitution went further. They provided that the privilege of the writ of habeas corpus should not be suspended. This was a radical change from the constitution of 1863, and was radically different from the Constitution of the United States. Our constitution of 1863 had provided:

> The privilege of the writ of habeas corpus shall not be suspended except when in time of invasion, insurrection, or other public danger the public safety may require it. (Art. 2, sec. 1.)

The Constitution of the United States provides:

> The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.

But in the making of our present constitution, in dealing with the great writ of freedom, no exception was made. Again, unmistakable, imperative words were used:

> The privilege of the writ of habeas corpus shall not be suspended. (Art. 3, sec. 4.)

The people clearly meant something by the change. They evidently meant exactly what they said—that the great writ which any citizen deprived of his liberty without due form of law may command should in no case be suspended under a claim of necessity for military rule Having so plainly declared in general terms against the doctrine of necessity in the former provision, as we have seen, they made this provision as to the privilege of the writ of habeas corpus to conform to that former declaration. They well knew that the exceptions contained in their former constitution, if retained, would lead to the temptation of encroachment on the guaranties of the constitution they were making. Providing that the privilege of the writ of habeas corpus should at all times be available they were simply again providing against the claim that constitutional guaranties may be suspended on the plea of necessity: for, as long as the writ of habeas corpus is available constitutional guaranties can not be ignored. That which Blackstone said about the constitution of his country is equally applicable to ours:

> Magna Charta only in general terms declared that no man should be imprisoned contrary to law; the habeas corpus act points him out effectual means, as well to release himself, though committed even by the King in council, as to punish all those who shall thus unconstitutionally misuse him. (Book 4, p. 439.)

This great, effective writ, by the terms of our State constitution, is always available to any citizen deprived of a constitutional guaranty. Since it is so available at all times, how can any departure from the constitution be allowed? Indeed the provision that the privilege of the writ of habeas corpus shall not be suspended is itself virtually a prohibition against martial law, for the availability of the writ and the recognition of martial law are totally inconsistent.

> Suspension of the writ of habeas corpus is essentially a declaration of martial law. (Messages and Papers of the Presidents, vol. 10, p. 465.)
>
> Promulgation and operation of martial law within the limits of the Union would necessarily be a virtual suspension of the habeas corpus writ for the time being. (De Hart's Military Law, p. 18.)
>
> The declaration of martial law in the State has the effect of suspending it. (Cooley, Principles of Constitutional Law, p. 301.)

Practically in England and the United States the essence of martial law is the suspension of the privilege of the writ of habeas corpus; that is, the withdrawal of a particular person or a particular place or district of country from the authority of the civil tribunals. (Halleck's International Law, vol. 1, p. 502. See also May's Constitutional History, ch. 11.)

The great Lincoln so understood it. In his proclamations he merely suspended the writ of habeas corpus. (Messages and Papers of the Presidents, vol. 6.) The founders of our State government really could have inhibited martial law by no stronger terms:

The privilege of the writ of habeas corpus shall not be suspended.

Not content with the two declarations against martial law which we have seen, the founders grew even more specific. They again said:

The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court for any offense that is cognizable by the civil courts of the State. (Art. 3, sec. 12.)

There is no ambiguity in these words. He who runs may read. They directly strike at martial law; they directly inhibit martial law; for the height of martial law is the supplanting of the civil courts by military courts. But this provision expressly ordains that military courts shall never take the place of the civil courts of the State for the trial of civil offense. No military sentence for a civil offense can rightly stand in the face of these words. Nor can these words rightly be overlooked in order to uphold any such military sentence. To do so is to make the constitution a rope of sand.

The men of the constitutional convention of 1872 had all witnessed the suspension of the privilege of the writ of habeas corpus and the trial and sentence of citizens by military courts. They had learned that departure from the constitution, though dictated by the best of motives, was liable to abuse. Experience admonished them to guard against anything of the kind in the future of their State. They no doubt believed that by the three provisions which we have noticed they had banished all claim for martial law in this State. Determination to do so was plainly dictated to them by the experiences through which they had passed. By those experiences they had come to know the truth of that which Hamilton had written long years before:

Every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the constitution of a country and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable. (The Federalist, No. 25.)

Can these direct provisions of our constitution be overcome by any implication that the people meant to retain martial law whenever an executive declared it necessary? Is there a presumption, as the majority opinion claims, against intent on the part of the people to abolish martial law? Can any such presumption prevail against the direct declarations which absolutely negative any such presumption? No: the principle of martial law can not be inherently connected with any constitutional government in which the constitution itself directly declares against the principle as our constitution does.

It is said that the State must live. So must the citizen live and have liberty—the constitutional guaranties vouchsafed to him. The founders of our State government saw fit to exclude this claimed theory of implied or presumed right of self-defense in a State. They knew it to be absolutely unnecessary as to any State in the American Union under the Constitution of the United States. They knew that it was even more likely to lead to abuse than to good. They could well afford to disclaim it by positive prohibitions against its exercise, for the Constitution of the Union fully protected the State. Were they not consistent in denouncing and prohibiting a principle of self-defense wholly out of harmony with constitutional government and in relying on the safety vouched to the State by the General Government of the Union of which it is a part? Was not the guaranty of the great General Government sufficient for the continued life of the State? That guaranty speaks plainly:

> The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion and, on application of the legislature or of the executive (when the legislature can not be convened), against domestic violence. (Art. 4, sec. 4.)

Does the State for its preservation need methods so at variance with constitutional guaranties as is martial law when it may obtain the power of the Union to suppress even domestic violence? Can not the militia and the United States Army pacify any section of the State or the whole State by methods strictly within the Constitution and laws? It was so believed when the Federal Government was formed. (Federalist, No. 42.) Referring to this guaranty by the General Government, a renowned author and judge says:

> This article, as has been truly said, becomes an immense acquisition of strength and additional force to the aid of any State government in case of internal rebellion or insurrection against lawful authority. (Cooley, Principles of Constitutional Law, 206. See also 1 Tucker's Blackstone, App. 367.)

It is claimed that the power given by the constitution to the governor as commander in chief of the military forces of the State to "call out the same to execute the laws, suppress insurrection, and repel invasion," authorizes a proclamation of martial law. Are these words to undo every other guaranty in the instrument? Can we overturn the many clear, direct, and explicit provisions, all tending to protect against substituting the will of one for the will of the people, by merest implication from the provision quoted? That provision gives the governor power to use the militia to execute the laws as the constitution and legislative acts made in pursuance thereof provide they shall be executed. It certainly gives him no authority to execute them otherwise. In the execution of the laws the constitution itself must be executed as the superior law. The governor may use the militia to suppress insurrection and repel invasion. But that use is only for the purpose of executing and upholding the laws. He can not use the militia in such a way as to oust the laws of the land. It is put into his hands to demand allegiance and obedience to the laws. It therefore can not be used by him for the trial of civil offenses according to his own will and law, for to so use it would be to subvert the very purpose for which it is put into his hands. By the power of the militia he may, if the necessity exists, arrest and detain any citizen offending against the laws; but he can not imprison him

at his will, because the constitution guarantees to that offender trial by jury—the judgment of his peers. He may use military force where force in disobedience to the laws demand it; but military force against one violating the laws of the land can have no place in the trial and punishment of the offender. The necessity for military force is at an end when the force of the offender in his violation of the laws is overcome by his arrest and detention. There may be force used in apprehending the offender and in bringing him to constitutional justice, but surely none can be applied in finding his guilt and fixing his punishment.

It is further claimed that the statute which says that the governor may declare a state of war in towns, cities, districts, or counties where invasion, insurrection, rebellion, or riot exists is legislative authority for martial law. (Code 1906, ch. 18, sec. 92.) The readiest answer to this argument is that a declaration of war is not a declaration of martial law. The mere presence of war does not set aside constitutional rights and the ordinary course of the laws. Civil courts often proceed in the midst of war. Again, if the act could be construed to contemplate martial law, it would be plainly contrary to the provisions of the State constitution which we have noticed and would be utterly invalid. Moreover, it is not within the power of a State legislature, even when not so directly forbidden as in ours, to authorize martial law. Martial law rests not on constitutional, congressional, or legislative warrant; it rests wholly on actual necessity. Nothing else can ever authorize it. And that necessity is reviewable by the courts. These views are ably supported by one of the most thoughtful and impartial students of the subject of martial law that recent years has produced—himself Judge Advocate General of the United States Army—G. Norman Lieber. In his learned review on the subject, published as a War Department document, hereinafter to be specifically cited, he says:

> It has also been asserted that the principle that the constitutional power to declare war includes the power to use the customary and necessary means effectively to carry it on lies at the foundation of martial law. I can not agree to the proposition. It is positively repudiated by those who justify martial law on the ground of necessity alone, and the Supreme Court of the United States stands committed to no such theory.

This is high authority, coming as it does from a military source. The Judge Advocate General rests not content with individual assertions; he resorts to the decisions and to sound reasons for his conclusions. He repudiates the view of the minority judges in the Milligan case. He says further:

> If the question were at the present time to arise whether the legislature of a State has the power to declare martial law, we would, in the first place, consult the Constitution of the United States, and there we would find this prohibition:
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> The Constitution of the United States affords protection, therefore, against the dangers of a declaration of martial law by the legislature of a State as well as against the danger of its declaration by Congress. The principle holds true both as to the United States and the States that the only justification of martial law is necessity.
>
> It is a well-settled principle that when a person is vested by law with a discretionary power his decision within the range of his discretion is conclusive on all, and therefore binding on the courts. This rule has been applied

to the subject of martial law, and it has been contended that the officers who enforce it are acting within the range of their discretion, and are protected by the principle which makes them the judges of the necessity of the acts done in the exercise of a martial-law power. From my standpoint such an application of the principle is entirely wrong, for the reason that if martial law is nothing more than the doctrine of necessity called out by the State's right of self-defense the officer can have no discretion in the matter. He will or he will not be able to justify according to his ability to prove the necessity for his act; he will find that toleration of the plea that the necessity for his act, and therefore its justification, can not be inquired into by the courts because he was acting within the sphere of his lawful discretion. The officer is not by any law vested with a discretion in this matter. Such a discretion and the doctrine of necessity can not exist together.

But this necessity need not be absolute, as determined by events subsequent to the exercise of the power. The Supreme Court has, as we have already seen, laid down the rule much more favorable to the person using the power. It is worth repeating:

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted must govern the decision, for he must necessarily act upon the information of others as well as his own observations. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good." (Mitchell *v.* Harmony, 13 How., 135; 14 L. Ed.,75.)

Under the Constitution of the United States there can never be any justification for the exercise of the military power to which these remarks relate other than the rule of necessity as thus applied.

In the North Carolina cases, supra, it was sought to justify the acts of the governor on provisions of the constitution and statutes of that State similar to those relied on in the cases before us; that is to say, that the governor may call out the militia, and may declare a state of war to exist. But the constitution of that State provided exactly as ours provides:

The privilege of the writ of habeas corpus shall not be suspended.

That which was said by the chief justice of North Carolina, in an opinion approved by his associates, aptly applies to our own constitution and laws, and to the cases under consideration.

Mr. Badger, of counsel for his excellency, relied on the constitution (art, 12, sec. 3): "The governor shall be commander in chief, and have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion"; and on the Statute of 1869–70 (ch. 27, sec. 1): "The governor is hereby authorized and empowered, whenever in his judgment the civil authorities in any country are made to protect its citizens in the enjoyment of life and property, to declare such county to be in a state of insurrection, and to call into active service the militia of the State, to such an extent as may become necessary to suppress the insurrection"; and he insisted that:

1. This clause of the constitution, and the statute, empowered the governor to declare a county to be in a state of insurrection, whenever, in his judgment, the civil authorities are unable to protect its citizens in the enjoyment of life and property. The governor has so declared in regard to the county of Alamance, and the judiciary can not call his action in question, or review it, as the matter is confided solely to the judgment of the governor.

2. The constitution and this statute confer on the governor all the powers "necessary" to suppress the insurrection, and the governor has taken military possession of the county, and ordered the arrest and detention of the petitioner as a military prisoner. This was necessary, for unlike other insurrections it

was not open resistance, but a novel kind of insurrection, seeking to effect its purpose by a secret association spread over the country, by scourging, and by other crimes committed in the dark, and evading the civil authorities, by masks and fraud, perjury and intimidation; and that—

3. It follows that the privilege of the writ of habeas corpus is suspended in that county until the insurrection be suppressed.

I accede to the first proposition; full faith and credit are due to the action of the governor in this matter, because he is the competent authority acting in pursuance of the constitution and the law. The power, from its nature, must be exercised by the executive, as in case of invasion or open insurrection. The extent of the power is alone the subject of judicial determination.

As to the second, it may be that the arrest and also the detention of the prisoner is necessary as a means to suppress the insurrection. But I can not yield my assent to the conclusion: The means must be proper, as well as necessary, and the detention of the petitioner as a military prisoner is not a proper means. For it violates the declaration of rights, "the privilege of the writ of habeas corpus shall not be suspended." (Constitution, art. 1, sec. 21.)

This is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each and prevent conflict. This is done by giving to article 12, section 3, the effect of allowing military possession of a county to be taken and the arrest of all suspected persons to be made by military authority, but requiring, by force of article 1, section 21, the persons arrested to be surrendered for trial to the civil authorities on habeas corpus should they not be delivered over without the writ.

This prevents conflict with the habeas corpus clause and harmonizes with the other articles of the "declaration of rights." i. e., trial by jury, etc., all of which have been handed down to us by our fathers and by our English ancestors as great fundamental principles essential to the protection of civil liberty.

I declare my opinion to be that the privilege of the writ of habeas corpus has not been suspended by the action of his excellency; that the governor has power under the constitution and laws to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of habeas corpus or to order the trial of any citizen otherwise than by jury. According to the law of the land such action would be in excess of his power.

The judiciary has power to declare the action of the executive, as well as the acts of the general assembly, when in violation of the constitution, void, and of no effect.

No power for the recognition of martial law could be found in our constitution, even were those provisions which directly condemn and prohibit it not in the instrument. To say that merest implication or presumption totally at variance with express inhibitions and directly overthrowing all the important guaranties of the instrument itself may be resorted to for the purpose of justifying martial law introduces a new rule of constitutional construction. The constitutional purposes of the militia can not rightly be so subverted. True, the militia exists by the constitution, but that military establishment is not raised by it ever to take the place of the constitution, its creator. The mere raising of a militia does not signify, as the majority conceive, that it is raised for martial law. It is raised to enforce the laws by constitutional methods. It is raised to comply with the great military organization of the Federal Government, under the provisions of the Constitution of the Union. (Art. 1, sec. 8, subd. 16.)

Let us look at some guaranties of our constitution that may now lightly be ignored by the force of the majority decision—that may be cast aside by the governor of this State and he not be made to answer for ignoring them. Let us see what express words of the instrument other than those already observed are torn down by this resort to mere

implication and presumption. Let us see provisions which the people as a whole deemed necessary for good government and sought to place beyond power of change which are now held to be under the control of the commander in chief of the militia by resort to a denounced plea of necessity judged by a single individual. It is well enough at least to preserve them here.

Article 3, section 4:

* * * No person shall be held to answer for treason, felony, or other crime not cognizable by a justice unless on presentment or indictment of a grand jury. No bill of attainder, ex post facto law, or law impairing the obligation of a contract shall be passed.

Article 3, section 10:

No person shall be deprived of life, liberty, or property without due process of law and the judgment of his peers.

Article 3, section 14:

Trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of 12 men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon petition of the accused and for good cause shown it is removed to some other county. In all such trials the accused shall be fully and plainly informed of the character and cause of the accusation and be confronted with the witnesses against him, and shall have the assistance of counsel and a reasonable time to prepare for his defense, and there shall be awarded to him compulsory process for obtaining witnesses in his favor.

Article 3, section 17:

The courts of this State shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay.

Can the absolute, unrestrained, and unreviewable will of the governor be substituted for these provisions? That it may is the decision of the majority of this court. One gross error of that decision is that it bases the right to martial law solely on the decision and proclamation of the governor and not on actual necessity. No mere decision or proclamation can justify martial law, even where it might be legally recognized. It can only be justified by the absolute necessity of fact for it. War must be so effective as to make the necessity for martial law. War must have made it wholly impossible to enforce or invoke the civil laws before martial law can be invoked. Even then the military commander is accountable before the civil laws when the exigency has passed. His judgment as to the necessity may be reviewed. There must be ultimate responsibility. It is even so as to the suspension of the writ of habeas corpus when a constitution authorizes the suspension. (Cooley, Principles of Constitutional Law, 300.) The military commander may be compelled to show reasonable ground for believing that the infringement of personal and property rights was demanded by the occasion. (Stephen, History of Criminal Law, 214.) We have seen these principles enunciated by Lieber above. See also Ballantine, post. And as long as there is a civil court that has the power to try an offender for breach of the civil law, martial law can not be applied for the trial of that offender. (Blackstone, Book 1, 413.) If a civil court exists that may take cognizance, then necessity for martial trial does not exist. As long as the civil law can be executed by the presence and operation of civil courts,

martial law through military courts can not take its place. Martial law can only operate where the civil law has become inoperative by the absence of courts. It is the actual, physical annihilation of the civil courts by the war that makes the only necessity upon which trial by martial law may ever be had. It is not merely the decision of the executive or the legislature that military courts will be more effective than the existing civil courts that can make the necessity. Nothing short of the absence of civil resort for trial can ever justify military trial of civil offenses.

If, in foreign invasion or civil war, the courts are actually closed and it is impossible to administer criminal justice according to law, then on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this Government is continued after the courts are reinstated it is a gross usurpation of power. (Ex parte Milligan, supra.)

We shall now soon proceed to see how these principles, announced by the Supreme Court of the United States, sustained preeminently by the best thought of all constitutional governments, as a research will show, apply to the cases of the petitioners, Nance and Mays. But before proceeding thereto it will be necessary to show the actual status of these cases. It may be inferred from the majority opinion that Nance and Mays are mere prisoners of war. They occupy no such relation. Nor are they merely detained by the militia in the suppression of riot, insurrection, or rebellion. Their petition for writs of habeas corpus and the returns of the warden of the penitentiary thereto make no such cases against them. Nor was it argued at the bar or in the briefs that they have any such relation. It plainly appears that they are citizens of Kanawha County, not connected with the military service, charged before a military commission for violations within that county of certain provisions of the statutes of West Virginia amounting thereunder to misdemeanors, arrested by the militia, tried by military commission pursuant to the order of the governor, sentenced for specific terms in the penitentiary, and transported thereto for imprisonment for their respective terms of sentence by the approval of the governor as commander in chief, all at a time when the criminal courts of Kanawha County were open, able, and with full jurisdiction to try the charges against them. In other words, these petitioners are held, as the returns show, on specific sentences, one for five years, the other for two, in the penitentiary, as civil offenders tried and committed by a military court under the guidance of the following military order.

STATE CAPITOL,
Charleston, November 16, 1912.

General Orders, No. 23.

The following is published for the guidance of the military commission, organized under General Orders, No. 22, of this office, dated November 16, 1912:

1. The military commission is substituted for the criminal courts of the district covered by the martial-law proclamation, and all offenses against the civil laws as they existed prior to the proclamation of November 15, 1912, shall be regarded as offenses under the military law, and as a punishment therefor the military commission can impose such sentences, either lighter or heavier than those imposed under the civil law, as in their judgment the offender may merit.

2. Cognizances of offenses against the civil law as they existed prior to November 15, 1912, committed prior to the declaration of martial law and unpunished, will be taken by the military commission.

3. Persons sentenced to imprisonments will be confined in the penitentiary at Moundsville, W. Va.

By command of the governor:

C. D. ELLIOTT, *Adjutant General.*

The returns of the warden do not pretend to justify his authority to hold petitioners other than under sentences for specific terms by this military commission. He justifies under no other commitments. It is to the commitments that we must look in these proceedings to determine the legality of the imprisonment. Says the great commentator:

> The glory of the English law consists in defining the time, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity. (Blackstone, book 3, p. 133.)

What actual necessity justified the creation of this military commission and the recognition of its powers to supplant the civil courts? As we have seen, nothing but the complete lack of power of the civil courts for the trial of the charges against Nance and Mays, arising by the annihilation and inoperation of those courts, could, if martial law was at all allowable, justify their military trial and sentence. Could Nance and Mays have been tried for the offenses with which they were charged by the civil courts, under the ordinary forms of law, as an actual fact? We know by the record of these cases, we know judicially, that they could have been so tried. But an answer that is attempted is this—that the governor by his proclamation had set off the portion of the county in which the offenses were committed and the offenders were arrested as a martial-law district. Again we say the mere proclamation could not alone make the necessity. The physical status must make it. No physical status existed, like the destruction of the ordinary courts, to make it necessary to try Nance and Mays other than they would have been tried if no disturbances had existed in Cabin Creek district. Those disturbances had not interrupted the very court that would have tried them if there had been no such disturbances. Those disturbances did not physically prevent the transportation of Nance and Mays out of the riotous district to the county seat for trial. If they could be transported out of that district to Moundsville for imprisonment, as they were, they could readily have been transported to Charleston for trial. It is said that the process of the court was prevented from execution in that district by the disturbances. That made no necessity for trial there. Surely the militia which was in possession of the district could execute all process of the court or cause the sheriff so to do. That was a very proper sphere of the militia in a riotous district (Ballantine, post). It can legally assist in the execution of the process of the civil courts. Thus, it may assist in the execution of the laws. But plainly it can not supplant operative civil courts. The militia must aid the courts, not supplant them. Both are created by the same Constitution. They belong to the same people. They must work in harmony as the people contemplated when they established both. The

proper province of the Army in such cases of disturbance as those on Cabin Creek was observed in the beginning of the Government, at the time of the whisky insurrection in western Pennsylvania in 1793:

> President Washington did not march with his troops until the judge of the United States district court had certified that the marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that "the object of the expedition was to assist the marshal of the district to make prisoners." Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject that he gave his orders with the greatest care and went in person to see that they were carefully executed. He issued orders declaring that "the Army should not consider themselves as judges or executioners of the laws but only as employed to support the proper authorities in the execution of the laws." (Garfield's Works (Hinsdale), vol. 1, p.. 162.)

The offenses of Nance and Mays were cognizable by a civil court—that is, they were capable of being tried in the proper criminal court of Kanawha County by a jury upon presentment and indictment by a grand jury. The disturbances did not make it impossible to give them the constitutional course of trial. Thus no necessity justified the course pursued. No actual physical fact, in the widest view, prevented the operation of the direct shield of the Constitution, wherein it provides:

> No citizen * * * shall be tried or punished by any military court for an offense that is cognizable by the civil courts of the State.

The offenses charged against Nance and Mays were plainly cognizable by a civil court—capable of being presented and tried there. The only excuse for their not being tried there is that the governor ordered otherwise. Thus the governor alone made the necessity. Under the circumstances, in any considerate view, their trials and sentences were not by due process of law and were grossly illegal and void.

There were no courts, other than those of justices, within the actual theater of the disturbances on Cabin Creek that could be rendered inoperative by the riotous condition there. The criminal court that pertained to that part and to the whole of the county was far from the seat of riot and wholly unaffected in its powers for regular and orderly presentment and trial. Even as to offenses cognizable only by justices there was power and opportunity to bring offenders from that region to trial before justices in undisturbed districts of the county. But it does not even appear that the disturbances in the district rendered it impossible, by the aid of the militia there present, for the courts of justices of the peace there to mete out justice according to the civil law. The war must put the ordinary courts out of business—out of reach—before military courts can ever take their place. This, of course, may be different in foreign conquered territory where the courts of the conquered country are not in sympathy with the obligations of the conquering army to society. It can not be gainsaid that the ordinary courts for Cabin Creek district were at all times during the disturbances within reach and in operation. The militia could reach them with prisoners for trial much more easily than it could reach the penitentiary with prisoners for imprisonment. The State courts were more accessible than the State prison. This principle, that accessibility to the ordinary civil courts excludes

resort to martial law, is established by the decision in the Milligan case in no uncertain language. We need no greater precedent.

Some of that which we have written in preceding paragraphs is based on the assumption of the tolerance of martial law, simply, of course, for the purposes of argument. We reiterate that it can never be rightly tolerated in this State. Indeed, martial law to the extent of trial and sentence for civil offense, anywhere within our fair land deserves no support from any student of constitutional history. Garfield, by his great argument and review of history before the Supreme Court of the United States, in the Milligan case, convinces any thoughtful reader in this behalf. No greater exposition of the subject, no severer condemnation of martial law as connected with constitutional government, was ever given to the world. It was given voluntarily, gratuitously, faithfully, solely in behalf of constitutional government. Yet it is but one among the many supporting the great weight of opinion on the subject. (Garfield's Works (Hinsdale), vol. 1, p. 143.)

The most recent review of the subject of martial law is that by Prof. Ballantine, of the University of Montana. It deals with all the adjudged cases, and assures one of the soundness of its conclusions. Specific citation to it will hereinafter be made. It denies that martial law may be applied in State government. This writer says:

> It is believed that there is no warrant in the history of constitutional government for vesting in the governor, as commander of the military forces of the State, the absolute discretionary power of arrest, and, as a logical consequence, of life and death, so that his command or proclamation may take the place of a statute and convert larceny into a capital offense, in going beyond legislative power, deprive citizens unreasonably and arbitrarily of life or liberty without review in the courts. (Johnson *v.* Jones (1867), 44 Ill., 142 [92 Am. Dec., 159]; Ela v. Smith (1855), 5 Gray (Mass.), 121 [66 Am. Dec., 356].)
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> The true view, undoubtedly, is that during a riot or other disturbance militiamen and their officers are authorized to act merely as a body of armed police, with the ordinary powers of police officers. (Franks *v.* Smith (1911) [142 Ky., 232], 134 S. W., 484 [Ann. Cas. 1912D, 319].) This is as far as the actual decision goes in Luther *v.* Borden (1849, 7 How., 1 [12 L. Ed., 581].) Their military character can not give them immunity for unreasonable excess of force. The governor of a State, as commander of the militia, is merely the chief conservator of the peace, and entirely destitute of power to proclaim martial law, punish criminals, or subject citizens to arbitrary military orders which he unreasonably believes to be demanded by public emergency.
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> In a garrisoned city held as an outpost of loyal territory, or in home districts threatened or recently evacuated by the enemy, military necessity for the public defense would certainly justify all temporary restrictions on the liberty of citizens essential to military operations, such as the extinguishment of lights, the requiring of military passes to enter or depart, and the quelling of public disorder. But the prosecution and punishment of persons suspected of conspiracy, sedition, or disloyal practices, and of treason itself, belongs to the tribunals of the law and not to the sword and bayonet of the military. Where the Army is not invading enemy territory of a recognized belligerent, but is in its own territory, the military authorities remain liable to be called to account either in habeas corpus or any other judicial proceeding for excess of authority toward citizens, no matter whether it occurred in propinquity to the field of actual hostilities or while the courts were closed or after a proclamation of martial law.

The issue involved in these cases is a marked one: Shall a citizen be subjected to trial before a military commission regardless of constitutional guaranties at any time the governor may see fit, and that

citizen have absolutely no redress from such procedure? In other words, may any citizen be absolutely within the power of the executive and the militia which has been placed in his hands? These questions are indeed more momentous than the people of this busy era may conceive. The affirmative answer to them annuls that true liberty which was bought by blood and sacrifice and which long has been jealously guarded and defended. It seems necessary that we should repeat what Mr. Justice Davis said in the Milligan case:

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will, and in the exercise of his lawful authority can not be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within the limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance, for if true republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law can not endure together; the antagonism is irreconcilable, and in the conflict one or the other must perish.

This Nation, as experience has proved, can not always remain at peace and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied my Washington and Lincoln, and if this right is conceded and the calamities of war again befall us the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency they would have been false to the trust reposed in them. They knew—the history of the world told them—the Nation they were founding, be its existence short or long, would be involved in war; how often or how long continued human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons they secured the inheritance they had fought to maintain by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every Government that in a great crisis like the one we have just passed through there should be a power somewhere of suspending the writ of habeas corpus. In every war there are men of previously good character wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies, and their influence may lead to dangerous combinations. In the emergency of the times an immediate public investigation according to law may not be possible, and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably there is then an exigency which demands that the Government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen that he shall be tried otherwise than by the course of common law. If it had intended this result it was easy, by the use of direct words, to have accomplished it. The illustrious men who framed that instrument were

guarding the foundations of civil liberty against the abuses of unlimited power. They were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right and left the rest to remain forever inviolate. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation.

A search of the books, extending over many days of labor in the investigation of this subject, discloses that no State in the Union has ever declared, by judicial decision or otherwise, principles to the extent of those announced by the majority opinion of this court. West Virginia, born of a love for and an adherence to constitutional government, seems now to have departed furthest therefrom. In Colorado and Idaho arrests and extended detention by the militia for the suppressing of riot and insurrection have been upheld as authorized by the exigencies existing and as necessary for the suppression of uprisings. But further than this no State has ever gone. The Supreme Court of the United States went no further in the Moyer case (212 U. S., 78; 29 Sup. Ct., 235; 53 L. Ed., 410). No court ever before upheld the action of a governor in ousting the courts of their jurisdiction as to civil offenses and in substituting himself therefor.

This State is a government of its own people. It should matter not that civil rights may at some time have been transgressed elsewhere. We should not permit them to be transgressed here. The insignia of the State bears our legend of freedom. It can not be kept unless we sacredly observe the Constitution by which all, whether guilty or innocent, are bound alike. Freedom for a West Virginian means the giving to him what his State constitution and that of the Nation guarantee to him. Nor does it matter whether that West Virginian be rich or poor, idler or laborer, millionaire or mountaineer. The constitution is no respecter of persons.

A sense of duty has impelled the writing of this opinion. If it may in the future only cause the doctrine promulgated by the majority to be questioned, the labor will not have been in vain.

Will the reader of this opinion reserve hasty judgment against conclusions which it announces until he has made studious examination of the citations herein and the three following expositions on the subject of martial law, together with the cases cited in them?

Military Commissions, Garfield's Works (Hinsdale), volume 1, page 143.
What is the Justification of Martial Law? Lieber, War Department, Document No. 79; North American Review, November, 1896.
Martial Law, Ballantine, Columbia Law Review, June, 1912.

The decisions and treatises relied on herein make no distinction in the test for martial law, whether in pacific districts or in the theater of actual war. In the one place as well as in the other the test is the same—the want of operative civil courts. An examination of the subject will not sustain a contention that the courts and the writers referred to were dealing only with martial law outside of the theater of actual war. They clearly show that martial law is as objectionable in the one place as in the other, unless it is justified by the absence of civil law.

Will the reader who refers to the decisions and treatises cited also note that there is a clear distinction between the power to use martial

acts for the suppression of riot, insurrection, or rebellion and the power to use martial law for the trial of civil offenses. Martial acts are one thing; martial law is another.

It may be said that the treatises referred to are not judicial in character. The same is true as to every textbook of the law.

And now, how applicable are the words of David Dudley Field, that ardent advocate of constitutional government:

> I could not look into the pages of English law—I could not turn over the leaves of English literature—I could not listen to the orators and statesmen of England, without remarking the uniform protest against martial usurpation, and the assertion of the undoubted right of every man, high or low, to be judged according to the known and general law, by a jury of his peers, before the judges of the land. And when I turned to the history, legal, political, and literary of my own country—my own undivided and forever indivisible country—I found the language of freedom intensified. Our fathers brought with them the liberties of Englishmen. Throughout the colonial history, we find the colonists clinging, with immovable tenacity, to trial by jury, Magna Charta, the principle of representation, and the petition of right. They had won them in the fatherland in many a high debate and on many a bloody field; and they defended them here against the emissaries of the crown of England and against the veteran troops of France. We, their children, thought we had superadded to the liberties of Englishmen the greater and better guarded liberties of Americans. (Brewer's Orations, vol. 6, p. 2154.)

ADDITIONAL OPINION.

POFFENBARGER, P.:

The attempt, in the dissenting opinion prepared since the filing of the court opinion, to apply to these cases principles, deemed clearly inapplicable by all concurring in the decision, renders it proper, in our judgment, to file an additional opinion, pointing out more specifically the grounds of distinction, and also to direct attention to the nonjudicial and speculative character of much of the matter quoted in the dissenting opinion.

The Milligan case (4 Wall. 2, 18 L. Ed., 281), the opinion in which constitutes the real basis of the elaborate argument against the views of the majority of the court, arose in the State of Indiana, in which there was no actual war nor any pretense thereof. That State was in a military, but nevertheless peaceable district. Milligan was a citizen of the State, arrested therein upon a charge of conspiracy against the Government of the United States, tried on that charge by a military commission, convicted and sentenced to death. The specifications under the charge were substantially as follows: That Milligan with others, in a time of actual war, set on foot a secret military organization for the purpose of overthrowing the Government, and conspired to seize the United States and State arsenal, and to release the prisoners of war confined in the military prison under charge of the military authorities, to arm these prisoners, to join with them such other forces as they could raise, and to march into Kentucky and Missouri and to cooperate with the rebel forces there; that the conspirators communicated with the enemy to induce them to invade the States of Kentucky, Indiana, and Illinois, intending themselves to join and cooperate with the enemy in the event of such an invasion; and that they armed themselves for that purpose. Of the character of the case, the court said:

> It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander,

at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them, and it is urged that this, in a military sense, constituted them the theater of military operations; and, as in this case, Indiana had been, and was again, threatened with invasion by the enemy. The occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law can not arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration. It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the Government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil, as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court were better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

Of the class of cases to which this one belongs, and that one did not, the court said:

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown to preserve the safety of the Army and society; and, as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this Government is continued after the courts are reinstated it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because during the late rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity, in one State when in another it would be "mere lawless violence."

It was against the attempted misapplication of martial law to the pacific State of Indiana and her citizens, on the ground of the existence of a state of actual war in other portions of the Union, but not extending into Indiana, that the thunderous eloquence and invincible logic of Garfield, Black, McDonald, and Mr. Justice Davis were directed. All of them admitted its proper application to the theater of actual war in the Southern States.

During the greater part of the period of the Civil War the situation in most of the State of West Virginia was similar to that of Indiana. It was pacific territory though within the lines of a military district. Here, as in Indiana and elsewhere, there were abuses of military authority on a mere pretext of necessity, since there was no actual war in it, and the functions of the courts were not obstructed. Acts and practices sanctioned by the principles of martial law, when applicable, were indulged in by the military officers and soldiers. This history was fresh in the recollections of the framers of the Constitution of 1872. The friends and relatives of delegates to that convention, and perhaps some of the delegates

themselves, had been victims of such illegal acts. To give effect to the provisions of the National and State Constitutions in all pacific territory in a period of war as in time of peace closes the avenue of such abuses of power as that condemned in the Milligan case. That this was the evil the provision quoted in the dissenting opinion from article 1 of the Constitution was intended to remedy is made manifest by the conditions and experiences, in the light of which it was framed and adopted. Constitutional and statutory provisions are always to be interpreted in the light of the evils they were obviously designed to remedy, and do not, as a rule, extend beyond such purpose. No other rule of interpretation is more firmly established or more generally recognized. It is a rule of common sense.

Nor do the terms of the section above referred to justify or sustain the broad view and claim for which it is cited. It makes no reference to the theater of actual war. It does not say the constitutional provisions shall be operative in invaded, insurrectionary, or rebellious portions of the State. It specifies times, not places, saying the provisions shall be operative (where they can operate) "alike in a period," not a place, "of war as in time of peace." In the preceding war the military authorities endeavored to make the existence of war in which the United States was engaged anywhere, though in a foreign country, justification for martial rule, in any or every part of the country, no matter how thoroughly tranquil its condition or free and effective the administration of the laws. Surely the framers of this provision, having so recently witnessed the impossibility of the operation of constitutions, statutes, and other civil laws in areas of actual war, did not contemplate their operation in such places. We are not to presume they intended what they knew could not be. On the contrary, we naturally presume against intent to accomplish the impossible, in the absence of expression thereof. If the section said the constitutional provisions should be operative in places instead of periods of war, there would have been an expression of such intent; but the statesmen of 1872 knew what was needed as a relief from doubt as to the guaranties of life, liberty, and property in pacific territory in periods of war, and carefully selected apt words to accomplish that purpose without destroying a sovereign power necessary to the preservation of those guaranties themselves. Section 3 of article 1 is a declaration of a general principle, carried into effect by the more specific provisions referred to in the original opinion filed herein, declaring subordination of the military to the civil power, and inhibiting trial of citizens by military courts for offenses cognizable by the civil courts. Their purpose is to prevent such trials in tranquil territory in which the courts have free and unobstructed operation. In the areas of actual war, however occasioned, they do not have free course. Offenses committed there are not cognizable by the civil courts, because not within their reach, and if they are committed in aid or furtherance of the invasion, insurrection, rebellion, or riot they are punishable by a military commission appointed for the trial thereof.

The dissenting opinion confuses the occasion and conditions of a state of war with the suspension of the writ of habeas corpus. During the troublous times of the Civil War there were attempted and actual suspensions of the writ in pacific portions of the country. That alone did not create war in such territory and substitute mili-

tary for civil rule. It was an express suspension of the writ in tranquil territory and no more. As the power was abused, and its exercise wrought injustice, it has been forbidden by the Constitution. But there is necessarily an informal and implied suspension in every instance of actual war throughout the field of military operations, as the opinion in the Milligan case and practically all other authorities admit.

While the Supreme Court of North Carolina, in Ex parte Moore and others (64 N. C., 802), the opinion in which is quoted at great length in the dissenting opinion filed here, claimed the writ of habeas corpus ran in the theater of actual war, it confessed its inability to enforce it, expressly refusing rules and attachments against the military officer, in whose custody the petitioners were, and the governor, by whose direction and orders he held them and refused to obey the writ. The chief justice stated his final conclusion in the following terms:

> The second branch of the motion, that the power of the county be called out, if necessary, to aid in taking the petitioner by force out of the hands of Kirk, is as difficult of solution as the first. The power of the county, or "posse comitatus," means the men of the county in which the writ is to be executed—in this instance Caswell—and that county is declared to be in a state of insurrection. Shall insurgents be called out by the person who is to execute the writ to join in conflict with the military forces of the State? It is said that a sufficient force will volunteer from other counties. They may belong to the association or be persons who sympathize with it. But the "posse comitatus" must come from the county where the writ is to be executed; it would be illegal to take men from other counties. This is settled law. Shall illegal means be resorted to in order to execute a writ? Again, every able-bodied man in the State belongs to the militia, and the governor is by the constitution "commander in chief of the militia of the State." (Art. 3, sec. 8.)

So the power of the county is composed of men who are under the command of the governor. Shall these men be required to violate, with force, the orders of their commander in chief, and do battle with his other forces that are already in the field? In short, the whole physical power of the State is, by the Constitution, under the control of the governor. The judiciary has only a moral power. By the theory of the Constitution there can be no conflict between these two branches of the Government. The writ will be directed to the marshal of the Supreme Court, with instructions to exhibit it, and a copy of this opinion to his excellency, the governor. If he orders the petitioner to be delivered to the marshal, well; if not, following the example of Chief Justice Taney, in Merriman's case (Annual Cyclopedia, for the year 1861, p. 555), I have discharged my duty. The power of the judiciary is exhausted, and the responsibility must rest on the executive.

The writ having been delivered to the governor, he replied to it by a letter to the Chief Justice, in which, after reciting his proclamation of war in two counties of the State, and the terrible conditions necessitating such action, he said:

> Under these circumstances I would have been recreant to duty and faithless to my oath if I had not exercised the power in the several counties which your honor has been pleased to say I have exercised constitutionally and lawfully, especially as, since October, 1868, I have repeatedly, by proclamations and by letters, invoked public opinion to repress these evils, and warned criminals and offenders against the laws of the fate that must in the end overtake them if, under the auspices of the Klan referred to, they should persist in their course. I beg to assure your honor that no one subscribes more thoroughly than I do to

the great principles of habeas corpus and trial by jury. Except in extreme cases in which beyond all question "the safety of the State is the supreme law" these privileges of habeas corpus and trial by jury should be maintained. I have already declared that, in my judgment, your honor and all the other civil and judicial authorities are unable at this time to deal with the insurgents.

The civil and the military are alike constitutional powers—the civil to protect life and property when it can and the military only when the former has failed. As the chief executive I seek to restore not to subvert the judicial power. Your honor has done your duty, and in perfect harmony with you I seek to do mine. It is not I or the military power that has supplanted the civil authority; that has been done by the insurrection in the counties referred to. I do not see how I can restore the civil authority until I "suppress the insurrection," which your honor declares I have the power to do; and I do not see how I can surrender the insurgents to the civil authority until that authority is restored. It would be a mockery in me to declare that the civil authority was unable to protect the citizens against the insurgents and then turn the insurgents over to the civil authority. My oath to support the Constitution makes it imperative on me to "suppress the insurrection" and restore the civil authority in the counties referred to, and this I must do. In doing this, I renew to your honor expressions of my profound respect for the civil authority, and my earnest wish that this authority may soon be restored to every county and neighborhood in the State.

This was in July, 1870. On August 15, 1870, the governor again wrote the Chief Justice apprising him of the pacification of the two counties in question, and his readiness then to make return to the writ. In this letter he said:

I assured your honor that as soon as the safety of the State should justify it I would cheerfully restore the civil power and cause the said parties to be brought before you, together with the cause of their capture and detention, That time has arrived, and I have ordered Col. George W. Kirk to obey the writs of habeas corpus issued by your honor.

Thus the case relied upon, as denying power in a governor to declare a state of war in a county, declares exactly the opposite. Though denying power in the executive to do more than make arrests for civil offenses under an erroneous interpretation of constitutional provisions, the decision also admits lack of power to enforce them as thus construed and so runs to a palpable absurdity. The decision was later interpreted by Justice Dick of the same court, the chief justice and Justice Settle being present, upon applications for bench warrants against the governor and his subordinate officers, as harmonizing with the views of this court on the main proposition involved. Justice Dick said:

The constitution and laws of the State authorize and empower the governor to organize and use the military forces of the State to suppress insurrection, etc., and the judiciary have no jurisdiction to arrest the governor while acting in that capacity for any alleged transcending of his authority in the discharge of executive duties. "The legislative, executive, and supreme judicial power of the Government ought to be forever separate and distinct from each other." (Const., art. 1, sec. 8.) Each of these coordinate departments has its appropriate functions, and one can not control the action of the other in the sphere of its constitutional power and duty. The government was formed for the benefit of all the citizens of the State, and it would be of little force and efficiency if the governor, in whom is vested the supreme executive power of the State, could be arrested and thus virtually deposed by a warrant from the judiciary issued upon the application of an individual citizen for alleged excess of authority in the performance of what the governor may consider his executive functions. * * * The governor is not above the law. He is as much subject to its obligations and penalties as the humblest citizen. But the constitution provides a court of impeachment as the proper forum for the trial of the governor for any abuse of executive power. After he is deposed or his term

of office expires he is liable to indictment and punishment for such violations of the laws of the State during his term of office. * * *

The only difference we have as to the other parties included in the application of the affiant is whether we have authority to issue a warrant which can be executed in the insurrectionary counties of Alamance and Caswell against the military officers of the governor. The laws of the State authorize the governor under certain circumstances to declare a county or counties in a state of insurrection and call out the militia to arrest insurgents, etc. See the opinion of Chief Justice Pearson in the case of A. G. Moore and others. This is a discretionary power vested in the governor by the constitution and laws of the State and can not be controlled by the judiciary; but the governor alone is responsible to the people for its proper exercise. The laws upon this subject would be virtually repealed, and the powers of the governor rendered wholly ineffectual, if it could be stopped or impeded by the judiciary upon the application of insurgents, the friends and sympathizers of insurgents, or other persons. We have nothing to say as to the policy of the law; as judges we can only consider its legal effect. * * * We are of the opinion that we have no authority to issue a bench warrant to the insurrectionary counties of Alamance and Caswell against the military officers and agents of the governor while they are acting under his orders in suppressing the insurrection. Outside of the insurrectionary districts they may be arrested, as the powers of the court are in full force there. The motion for a bench warrant against G. W. Kirk, G. W. Burgen, and Alexander Ruffin is allowed. The warrants will be directed to the sheriff of Wake County, to be executed in any part of the State except the counties of Alamance and Caswell.

We hold the governor's determination of the justification or necessity for proclamation of a state of war is not reviewable. So the decision, relied upon in the dissent, holds. We hold the writs of the courts do not run in the war area or district under martial law. So that decision holds. We hold the courts can not arrest the arm of the executive engaged in the suppression of an insurrection. So that case holds. That court endeavored to enforce the view that the nonsuspension clause relating to the writ of habeas corpus limits the power of the executive in the insurgent district to the making of arrests and immediate delivery of the prisoners to the civil authorities, but admitted lack of power to enforce that view, and said, as we say, the governor was beyond the power of the judiciary and responsible only to the people for his actions in the insurrectionary district declared to be in a state of war.

Recurring to the argument founded upon recent observation and experience in the Civil War at the date of the adoption of the constitution, we find further and decisive refutation thereof in a constitutional provision and a statute not referred to in the original opinion. Section 1 of chapter 14 of the code of 1868, in force at the date of the adoption of the constitution of 1872, authorized the use of the militia to repel invasion and suppress insurrection, and also to suppress any combination in any part of the State too powerful to be suppressed by ordinary judicial proceedings, endangering the peace and safety of the people or obstructing the execution of the laws. Section 6 of the same chapter authorized him to cause to be apprehended and imprisoned or compelled to leave the State all who in time of war, insurrection, or public danger should willfully give aid, support, or information to the enemy or insurgents, or who he shall have just cause to believe are conspiring or combining together to aid or support any hostile action against the United States or this State. Sections 7, 8, and 9 of that chapter show he was not limited in the means by which to exercise this power to the civil or judicial process

of the State. He was to act upon his own judgment and select his own method of procedure. Section 21 of article 8 of the constitution contained this provision:

> Such parts of the common law and of the laws of his State as are in force when this article goes into operation and are not repugnant thereto shall be and continue the law of the State until altered or repealed by the legislature.

It never occurred to the legislature of 1872, composed largely of the men who drafted the constitution of that year and aided in its adoption. nor to any other subsequent one, that the provisions of chapter 14 of the code of 1868 were repugnant to article 8, for they were not repealed then, while the constitutional purposes were fresh in the minds of our statesmen, nor have the large powers there given to the governor ever been taken away. On the contrary, they were reenacted in 1882 and still remain in the code, amplified by sections 54 and 92 of chapter 18 of the code. None of the laws in force then were deemed to be repugnant to any of the provisions of the constitution relied upon by the petitioners or in the dissenting opinion, for none of them are in article 8, and that article continued in force all laws not repugnant to it, among them all the laws authorizing the governor to use the military forces for the purposes and in the manner in which they were used or could have been used previously under the war constitution of 1863.

An article prepared by Judge Advocate General of the United States Army Norman G. Lieber, relied upon in the dissenting opinion, like the decision in the Milligan case, deals exclusively with rights and powers in pacific territory not in the theater of actual war. He begins by naming the four kinds of military jurisdiction: (1) Regulation of the army; (2) military rule in an enemy's territory during occupation thereof; (3) military power in time of war, insurrection, or rebellion over persons in the military service as to obligations arising out of such emergency and not falling within the domain of military law nor otherwise regulated by law, an application of the doctrine of necessity, founded on the right of national self-preservation; and (4) martial law at home or as a domestic fact, by which is meant military power exercised in time of war, insurrection, or rebellion in parts of the country retaining allegiance. He then says:

> It is to this last-mentioned kind of military jurisdiction that these remarks apply.

Though he thus expressly says he is not discussing the exercise or limits of military power in the theater of actual war, insurrection, or rebellion, but only the limits of such power in parts of the country retaining allegiance, necessarily tranquil country, the dissenting opinion takes no notice of the subject of discussion and treats his observations as applicable to powers and transactions in insurrectionary territory officially declared to be in a state of war. This is a palpable oversight or misapprehension of the true meaning of his observations and citations of authority. His quotation from the opinion in Luther *v.* Borden (7 How., 1; 12 L. Ed., 584) shows this. We read:

> In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent nor under what circumstances that power may be exercised by a State. Unquestionably a military government, established as the permanent government of a State, would not be a republican government, and it would be the duty of Congress to overthrow it.

But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the preservation of order and free institutions and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition too formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition.

Having quoted this, Gen. Lieber said:

In regard to this case, it is deserving of particular notice that it is an error to rely on it in proof of the theory that Congress has the power to declare martial law in the sense in which we have been using that term. It is true that this was a case of so-called martial law declared by the legislature; but what did the legislature mean by it? The term has no fixed meaning, even at the present day. Different writers still give it different meanings. When the Legislature of Rhode Island made use of it in 1842, it probably was intended to have no more definite meaning than that the militia of the State was to use its military power to suppress the enemies of the State. It was an authorization to do what was done when the military officer broke into the house of one of the enemies of the State in order to arrest him. He was a public enemy against whom the military power had been called out. It is evident that this is not the kind of martial law which we have been discussing.

In the face of the declaration by the Supreme Court of the United States, above quoted, it is argued that a State can not declare a state of war and adopt the usages of war in the suppression of an insurrection, because the National Government may be summoned to the aid of the State in its efforts to uphold and enforce its authority. As the court in Luther *v.* Borden plainly says, that national obligation and right is in aid of the State government, not in exclusion thereof. It was never intended that the Federal Government should assume the duties of State government, nor reduce the State to a condition of dependence upon the discretionary exercise of Federal power respecting the maintenance of its authority within its own territory not in conflict with the limitations of the National Consitution upon the powers of the States. The Federal Government assumed no obligation to do for the States what they can do for themselves, nor laid any restraint upon their sovereign powers, except in certain instances or for the accomplishment of enumerated Federal purposes. Observe that Judge Cooley said, in the quotation found in the dissenting opinion, this article of the National Constitution is an "acquisition of strength and additional force to the aid of any State government." Why should we be asked to read this as if it said "to the exclusion of the powers of any State government?"

Prof. Ballantine, like Gen. Lieber, was discussing the exercise of military power in pacific territory, as a careful reading of the quotation from him shows. He is merely stating the doctrine of the Milligan case. Franks *v.* Smith, cited by him, did not arise under a proclamation of war. Johnson *v.* Jones and Ela *v.* Smith are cited by him against authority of the governor without legislative sanction to declare war. Here we have both legislative and express constitutional authority in the governor to do so. The quotations from Gen. Garfield, Gen. Norman, Prof. Ballantine, David Dudley Field, and others are not judicial expressions, even if they related to the

question here involved; but, worse yet, they have no application to the question.

Another distinction not marked nor indicated in the dissenting opinion runs through much of the mass of quoted matter therein from public writers. That is the distinction between the power to do an act and liability for a wrong done in the exercise of that power. We have in this case nothing to do now with claims for damages for wrongs done by the executive officers in the exercise of their powers. The opinions in the North Carolina case, relied upon in the dissenting opinion, not quoted therein but quoted here, mark this distinction plainly. While the executive and his subordinate officers are engaged in the suppression of an insurrection, there is no power in the courts to restrain them, though there may be, after the war is over, a right of action for damages for some wrongful act, done in the exercise of the power. This principle applies in other relations. If a man has land leased for certain purposes, and in carrying on those purposes he does some wrongful act, he is liable for the wrong done, but that liability does not defeat his right to the use of the land. Under our tax laws land may be sold for the nonpayment of taxes, and there may be a right, because of some error or violation of law, to avoid the sale; but, notwithstanding, the law gives no remedy to stop the sale by injunction or otherwise. Quotations of law, applicable to the question of liability for wrongs done in the exercise of executive power, are wholly inapplicable to the question of the power of the court to stop, restrain, or interfere with the exercise thereof, and they are therefore misleading and confusing.

There are many instances in which private right or interest must be subordinated to and compelled to await the accomplishment of great public purposes.

Members of the legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during the session, and for 10 days before and after the same; and for words spoken in debate, or any report, motion, or proposition made in either house, a member shall not be questioned in any other place. (Const., art. 6, sec. 17.)

The following persons shall also be privileged from arrest under civil process, except for an escape, to wit: A judge, grand juror, or witness, required by lawful authority to attend at any court or place, during such attendance and while going to and from such court or place; officers and men, while going to, attending at, and returning from any muster or court-martial which they are lawfully required to attend; persons attending funerals and ministers of the gospel while engaged in performing religious service in a place where a congregation is assembled and while going to and returning from such place. Such privilege shall only be on the days of such attendance, and an additional day for every 20 miles traveled in going and returning. (Code 1906, ch. 41, sec. 14.)

No civil process or order shall be executed on Sunday, except in cases of persons escaping from custody, or where it may be especially provided by law. (Code 1906, ch. 41, sec. 15.)

These provisions rest upon the obvious physical necessity, in Government as elsewhere, even at post offices, railway stations, hotels, on highways, and in mountain passes, of the observance of order as to time, place, and methods of procedure.

Aside from the argument of presumption against the destruction or abolition of a high sovereign power by mere implication, the terms of section 12 of article 7 of the constitution may be invoked. This section confers power upon the governor in express terms to—

call out the military forces of the State * * *, to execute the laws, suppress insurrection, and repel invasion.

Here is a constitutional grant of express power to "suppress insurrection," without limitation or prescription of the mode of exercise thereof. That grant, according to settled rules of interpretation recognized everywhere, carries with it, by implication, all means reasonably necessary to effective exercise of the power. Under other rules it carries such power and means as are included in the term "suppress insurrection," as defined in law. They are defined in law by the authorities relied upon in the dissenting opinion, and all others, as including the right to apply martial law in an insurrectionary area. It has been so understood in all countries and in all ages. So all departments of the Federal Government understood and applied it in the War of 1812 and the late Civil War.

The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions. * * * When words in a statute have acquired through judicial interpretation, a well-understood legislative meaning, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears. (Daniel *v.* Simms, 49 W. Va., 554; 39 S. E., 690, pts. 6, 7, and 8, syllabus.)

These rules are just as applicable in the interpretation of constitutional provisions as in that of statutes. This express grant of power to the executive necessarily destroys all such supposed implications as are relied upon in the dissenting opinion.

That to justify the application of martial rule to a territory or section of a State the courts thereof must be wholly closed and inoperative is not sustained by the authorities cited in the dissenting opinion. Some passages in the opinion in the Milligan case seem to say so, but others say the contrary. The court based its position on its judicial knowledge that—

in Indiana the Federal authority was always unopposed and its courts always open.

And—

their process unobstructed.

The opinion says:

After this military tribunal was ended the circuit court met, peacefully transacted its business, and adjourned, * * * required no military aid to execute its judgments, * * * and was never interrupted.

The opinion also says that on the theater of active military operations where war really prevails—

there is necessity to furnish a substitute for the civil authority, * * * and it is allowed to govern by martial law until the laws can have their free course—

and that—

martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction.

Having spoken of open or unobstructed courts having free course as precluding martial law, and overthrown, obstructed, or interrupted courts as justifying it, shall we not take the opinion as having stated just what the court meant? How else may we logically and sensibly interpret its language? Can we say it meant only one of several different things mentioned as producing the same

effect? No doubt they meant just what Mr. J. S. Black, the ablest of Milligan's counsel, and the greatest lawyer in the case, said of the general plan of our constitutional government in his argument:

> Military force repels invasion and suppresses insurrection; you preserve discipline in the Army and Navy by means of courts-martial; you preserve the purity of the civil administration by impeachment of dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities.

Of trials by military commissions in the war areas he said:

> I have made no allusion to their history in the last five years. But what can be the meaning of an effort to maintain them among us?

This was an admission of their validity in the theater of war and their invalidity in pacific territory. Milligan did not apply for his writ until after the close of the war, and it was not decided until December, 1866. A sitting court, whose process is obstructed by insurrectionary force, is in a practical sense no court and might as well be "closed" or "overthrown."

In dealing with grave questions such as this we must govern ourselves by settled rules and principles of law, including the rules of construction and interpretation. It is not permissible to set aside or ignore them in trivial cases. The greater the moment of the question or matter involved, the greater the reason for strict adherence to law and observance of distinctions in the application of principles and precedents.

In the Supreme Court of Appeals of West Virginia.

IN RE MARY JONES. IN RE CHAS. H. BOSWELL, IN RE CHARLES BATLEY, IN RE PAUL J. PAULSON.

Submitted February 20, 1913. Decided March 21, 1913.

1. The principles and conclusions of law announced in State ex rel. Mays *v.* Brown, warden, and State ex rel. Nance *v.* Brown, warden, having been reexamined, after thorough argument and consideration, are approved and reaffirmed.
2. A state of war having been declared in any part of the State on an occasion of insurrection, the war power of the State in the form of military rule, defined by the usages of nations, prevails in the territory subject to the proclamation, excluding the civil powers as to offenses, if the executive so order, while the peace powers of government under civil law prevail elsewhere.
3. In such case the governor may cause to be apprehended in or out of the military zone all persons who shall willfully give aid, support, or information to the insurgents and detain or imprison them pending the suppression of the insurrection.
4. Sections 6, 7, 8, and 9 of chapter 14 of the code, authorizing such arrest and imprisonment, do not violate the provisions of the State and Federal Constitutions inhibiting deprivation of liberty without a trial by jury and are constitutional and valid.
5. Being so, such arrest, detention, and imprisonment, by virtue of said statute, are effected by due process of law within the meaning of section 10 of Article III of the constitution of this State and the fourteenth amendment to the Constitution of the United States.

A. M. Belcher and Harold W. Houston, for petitioners.

William G. Conley, attorney general; J. O. Henson, assistant attorney general; George S. Wallace, Brown, Jackson & Knight; and Price, Smith, Spilman & Clay, for respondent.

Statement by Poffenbarger, president:

On the petitions of P. J. Paulson, C. H. Boswell, Charles Batley, and Mary Jones, alleging their confinement in a military guardhouse in the town of Pratt by the military authorities of the State, acting under the orders of the governor: a proclamation by the governor of a state of war in the territory in which the said military guardhouse is, a portion of Kanawha County; the organization of a military commission to sit and act in said district for the trial of such persons as may properly be brought before them; their apprehension of petitioners in said county outside of said military district, by a civil officer, on complaints filed with a justice of the peace charging them with a conspiracy to inflict bodily injury upon sundry persons unknown to the complainant and to destroy and injure personal property not their own and the killing of one Fred Bobbitt in pursuance of said conspiracy; and their delivery by said officer to the said military authorities by the verbal order of the governor; writs of habeas corpus were issued, directed by the governor, the

adjutant general of the State, and the members of the military commission, commanding them forthwith to produce the bodies of the relators.

The returns to the writs admit the arrests and detention complained of, the filing against the petitioners of charges and specifications prepared by the provost marshal, charging each of them with having conspired with numerous other persons to inflict bodily injury upon one Thomas Nesbit, and, in pursuance to such conspiracy, with having shot him with intent to maim and disfigure, disable, and kill him, on or about the 10th day of February, 1913, within the district covered by the governor's proclamation of war; with having murdered one Fred Bobbitt and one W. R. Vance within said district on or about the said date; with having otherwise conspired for such purposes and in such manner, and so far executed such conspiracy as to render them guilty of felonies under what is known as the "Red Men's act"; with having become accessories after the fact to the alleged murder of Fred Bobbitt by the rendition of aid to the principal felons in their efforts to escape; and with having unlawfully carried concealed weapons.

The arrest of the prisoners outside of the military district by a civil officer and conveyance of them into the military district are admitted, but it is denied that they were arrested without a warrant, and also that they were carried into the military district by the direction of the governor or any of the military authorities under his control. An the contrary, it is averred that a warrant was issued on the complaint of a citizen and the arrest made under the warrant, and that they were conveyed into the military district by the order of the justice of the peace to whom the warrant was returnable. The returns also denied any fixed purpose or determination on the part of the military commission to try and convict the petitioners and say the charges preferred against them have not yet been inquired into. Averring the arrests to have been made within the military district and denying them to have been made in pacific territory, they say the prisoners were arrested in said district during a time of insurrection, riot, or lawlessness in which insurrection, riot, or lawlessness the petitioners were then participating.

As the basis of three successive proclamations of war in practically the same territory, all within less than a year, they set forth large amounts of information collected by the governor and military forces, showing a reign of terror, characterized by pitched battles between miners and mine guards, with long-range and deadly rifles and machine guns, in which numerous persons have been killed and a great many others wounded, and a vast amount of property destroyed. In connection with this, records and papers of the civil authorities are produced indicating their utter inability to cope with the situation. Summarizing the conditions, the returns say:

> Respondents are informed and believe, and so aver, that public sentiment in Kanawha County is so divided and partisan feeling so universal that it is impossible to procure a jury in said county, as prescribed by law, to impartially try criminal cases against active participants in this industrial struggle. Your respondents are informed and believe, and so aver, that approximately 30,000 shots have been exchanged during the existence of this warfare, that 16 men are known to have been killed, and your respondents are informed and believe, and so aver, that the actual number of dead will in all probability reach 50 or more.

Of the part played by the petitioners in the uprising, each of the returns says:

> Your respondents are informed and believe, and so aver, that the petitioner has been largely instrumental in causing and encouraging the lawlessness, riot, and insurrection now prevalent in the aforesaid territory, and that the detention of the prisoner is, in their judgment, necessary in order to effectually suppress the lawlessness, insurrection, and riot which occasioned the proclamation of martial law.

The bodies of the petitioners having been produced, the cases were submitted on demurrers to the petitions and motions to quash the same, demurrers to the returns and motions to quash them, and general replications. Affidavits of the justice with whom the complaints were filed and by whom the warrants were issued, and the prosecuting attorney of the county, filed in support of the returns, show that the former, by direction of the latter, ordered the officer by whom the arrest had been made to carry the prisoners into the military district. To show the existence of the grounds upon which the prosecuting attorney gave this direction, he states his knowledge and information as to the lawless conditions prevailing in the military district, the declaration of martial law and a state of war therein, summarizes many of the matters set forth in the returns, narrates the details of the uprising of February 7, 1913, in the course of which Vance and Bobbitt were killed, and gives it as his belief and opinion that the military commission has jurisdiction of the offense with which the parties are charged, and also that justice can not be administered to them in the civil courts of the county, because of inability to obtain the testimony of the witnesses, since they reside in the military district where lawlessness obtains, producing a state of fear and intimidation. As to this point, the affidavit says:

> Martial law has been three times declared in portions of said county; * * * owing to the terror and intimidation created by this state of affairs, practically without exception it has been impossible during all of the period aforesaid to secure the apprehension and indictment of the guilty parties in any of these crimes, even in the periods when martial law did not prevail; * * * while the lawlessness and crimes have been principally, though not entirely, confined to the district now under martial law, the disturbance thereof has extended to other parts of the county to such an extent that the civil courts have been and are virtually closed for the punishment of crimes committed in the district now under martial law.

An affidavit of the sheriff of the county, filed, contains the following:

> Affiant has read the affidavit of T. C. Townsend, and concurs in the statement therein contained of the lawlessness and disorder and conditions generally prevailing in said county during many months past, and in the opinion of said Townsend that for the reasons stated in said affidavit it has been and is impossible to administer justice in the civil courts to persons for offenses committed in the district now under martial law, and that the civil courts are virtually closed for the punshment of crimes which have been committed in said district during the disturbances mentioned in the affidavit of said Townsend.

An affidavit of Ira Mottesheard, clerk of the circuit and intermediate courts of Kanawha County, filed by the petitioners, says that so far as affiant knows the writs and process of said courts have not been obstructed or the service of the same prevented or hindered in any part of the said county; that at the present time he has no knowledge of any obstruction of the service of the process of the said

court; that both of said courts have, during the entire time he has served as such clerk, regularly convened as provided by law at the courthouse of said county, in the city of Charleston; that at no time has it been interrupted or impeded by any act of violence, rioting, or other cause in any part of said county, and that at the date of the affidavit the courts were in session at the courthouse of said county and wholly unobstructed in their proceedings. An affidavit of the same officer, filed by the respondents, says that immediately preceding or during the time martial law has been in effect, in so far as he recalls, no writs of any kind or character were issued by the courts of which he is clerk directed to be served within the territory covered by martial law.

OPINION.

POFFENBARGER, President:

Except in so far as they pertain to the arrest of the petitioners outside of the military district and their conveyance into it, the affidavits filed relate to conditions and circumstances relied upon as justification of the declaration of a state of war in the military district, and the argument for the most part deals with the main questions disposed of in Ex parte Nance and Mays, recently decided by this court. Here, as in those cases, certain constitutional provisions are relied upon as authority for the position that in the exercise of the constitutional and statutory power to suppress insurrection and repel invasion the governor can not declare a state of war and apply military rule, and that citizens arrested in the exercise of that power must be immediately turned over to the civil authorities for inquiry as to their guilt of the offenses of which they are accused and for trial by the civil courts when there is probable cause to believe them guilty.

Nance and Mays had been tried by a military commission for offenses committed within the military zone and sentenced to terms in the penitentiary, and they sought liberation by writs of habeas corpus. To the extent of the claim of right in the governor to imprison them pending the proceedings to suppress the insurrection the court sustained him. The conclusion is summarized in the following terms:

> Our present inquiry goes only to the legality of the custody of the respondents at the present time and under the existing conditions. The territory in which the offenses were committed is still under martial rule. It suffices here to say whether the imprisonment is under present conditions authorized by law, and we think it is. We are not called upon to say whether the end of the reign of martial law in the territory in question will terminate the sentences. Upon that question we express no opinion.

As a premise to this conclusion, the power of the governor to declare a state of war, to use the military forces to suppress insurrection or rebellion or repel invasion, and to establish a military commission for the punishment of offenses committed within the military zone and by its judgment impose imprisonment, notwithstanding the constitutional guaranty of subordination of the military to the civil power, the privilege of the writ of habeas corpus and the right of trial by jury in the civil courts for offenses cognizable by them, and the conclusiveness of the executive declaration of a state of war, were asserted. The power and authority of the court to interfere with the executive arm under such circumstances was denied. We

also held and asserted this right and power in the executive as to a city, district, or county of a State, notwithstanding the courts were open and sitting in other portions of the county. But there was no attempt in the opinion filed in these cases to define or enumerate the offenses cognizable by the military commission or the extent of the punishments it may inflict. We were careful to say there were limits beyond which the executive could not go without subjecting himself or his officers and men to rights of action for damages on the restoration of peace and tranquillity. We marked the distinction between executive power and the possibility of wrongdoing in the exercise thereof.

A reexamination of the opinion in those cases, in the light of further argument and additional authorities consulted, has developed no reason or cause for departing from the conclusions and principles there announced. On the contrary our impression as to the basic principles of that decision has been strengthened and confirmed. Considering the constitution as a whole and endeavoring to give effect to all of its parts, we asserted power to set aside and ignore, to some extent, in the suppression of an insurrection, ordinary judicial process and remedies. The provisions of our constitution relied upon as being inconsistent with this conclusion are perhaps no broader nor more positive in their terms than some of those of the Federal Constitution, binding on the State courts as well as the Federal. Power in the Federal Government to establish military rule and martial law over citizens as well as persons belonging to its land and naval forces and the militia engaged in its service, in enemy territory, whether in a foreign country or in sections of the Union in a state of insurrection or rebellion, is established beyond question.

During the occupation of the city of New Orleans by the military authorities and forces in the late war, Gen. Dow was sued in a municipal court by one Bradish Johnson for the value of certain property, 25 hogsheads of sugar, a silver pitcher, half a dozen silver knives, and other tableware, taken by Capt. Snell's company under the command of Gen. Dow. The defendant did not appear nor make any defense and there was a judgment against him by default. After the war, a suit was brought on this judgment in the Circuit Court of the United States for the District of Maine, and the question of the validity of that judgment was certified to the Supreme Court of the United States. The court held that the State court had no jurisdiction of the cause of action, and that the judgment was void. Delivering the opinion of the court, Mr. Justice Field said:

This doctrine of nonliability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate Army, when in Pennsylvania, as to members of the National Army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in these tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war. * * * We fully agree with the presiding justices of the circuit court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern and to it the military must always yield. We do not controvert the doctrine of Mitchel *v.* Harmony, reported in the Thirteenth of Howard; on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been per-

mitted by the executive department of our Government. The question here is, what is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as is supremacy of the civil law at home, and in time of peace is essential to the preservation of liberty.

In United States *v.* Diekelman (92 U. S., 520), Mr. Chief Justice Waite, speaking of Diekelman, commander of a foreign vessel, suing for damages on account of detention by Gen. Butler in the port of New Orleans, said:

When he entered the port, therefore, with his vessel, under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority. Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theater of the most active and important military operations. The civil authority was overthrown. Gen. Butler, in command, was the military ruler. His will was law, and necessarily so.

Dow *v.* Johnson, cited, shows that then the municipal courts of New Orleans were open by permission of the commanding general. In Dooley v. United States (182 U. S., 222), Mr. Justice Brown quoted with approval the following from Halleck in his work on International Law:

The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in possession during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists and decisions of courts—in fine, from the law of the nations * * *.

The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. * * * He, nevertheless, has all the powers of a de facto government and can, at his pleasure, either change the existing laws or make new ones.

This was said of an American military commander operating in the island of Porto Rico during the Spanish-American War. The same court, in New Orleans *v.* Steamship Co. (20 Wall., 387), declares the same law applicable in domestic territory in a state of rebellion. Of the power of the military government over the city of New Orleans, after this conquest, the court said the military government had—

the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has the right to displace the preexisting authority and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.

This enunciation of principles was quoted by Mr. Justice Brown and approved by the United States Supreme Court in Dooley *v.* United States as late as the year 1900.

Martial law is the temporary government and control by military authority of territory in which, by reason of war or public disturbance, the civil government is inadequate to the preservation of order and the enforcement of law. (40 Cyc., 387.) The proclamation of martial law establishes the will of the military commander as a rule of authority. His will, however, is not to be arbitrarily exercised, and it usually supersedes the local law only so far as necessary for the preservation of order, and, in case of invasion, the supremacy of the conqueror. (40 Cyc., 390.)

The article from which these quotations are made was prepared as late as 1912 by George Grafton Wilson, professor of international law in Harvard University, lecturer on international law in Brown University, and in the United States Naval War College. Of the duration of martial law, he said:

The duration of martial law is determined by the necessity which led to its establishment, and it therefore ceases as soon as the civil authorities are able to resume the unobstructed exercise of their ordinary functions. (40 Cyc., 319.)

In the great contests in England over the interpretation of the unwritten constitution and to maintain its integrity and guarantees, this principle was admitted by the stoutest and most radical of the opponents to royal aggression and encroachment. Hear the admission of Mr. St. John, counsel for John Hampden, in the Ship Money case:

My Lords, from this objection of sudden danger I come to the next, which is the third thing before offered unto your lordships, which is an admittance that the danger may sometimes be such that the subjects' goods, sometimes without their consent, may be taken from them; for property being both introduced and maintained by human laws, all things by the law of nature being common, there are therefore sometimes, like the Philistines being upon Sampson, wherein these cords are too weak to hold us. "Necessitae enim" (as Cicero saith) "magnum humanae imbecillitatis omnem legem frangit;" at such times all property ceaseth, and all things are again resolved into the common principles of nature. (State Trials, Vol. III, p. 903. Likewise Sir Edward Littleton for the King, p. 959.) In the next place they say if the king be in the field with his banners displayed; this they say was tempus belli. Can not the courts of justice sit, then, but there must be a peace? (39 Ed. 3 Rot., 10.) Did not the court of justice sit then? Our ordinary printed books shew what causes of law then were. And in Henry VI's time, in all of civil wars, and in Henry VII's time, they sat then. But the true time to make it tempus belli is to make a war against the king.

Then the admission of Mr. Holborne, on behalf of Mr. Hampden (p. 975):

Now, in times of necessity there is a law that doth compel; nay, there is a stronger penalty than our laws can imagine, for our laws can make but a penalty of all that you have, but how? To the King. But when there is a danger from an enemy there is not only a danger of losing all that one hath, but of losing lives and lands and all that we have, and all into the hands of the enemy.

Sir George Crooke, justice of the Kings Bench, delivering his opinion in favor of Hampden and against the King, said (p. 1162):

Royal power, I account, is to be used in cases of necessity and imminent danger when ordinary courses will not avail, for it is a rule, "Non occurrendum est ad extraordinaria, quanda fieri potest per ordinaria," as in case of rebellion, sudden invasion, and some other cases where martial law may be used and may not stay for legal proceedings. But in a time of peace and no extreme necessity, legal courses must be used and not royal power.

Likewise Sir Richard Hutton, of the court of common pleas, resolving against the King (p. 1198):

> For I do agree in the time of war, when there is an enemy in the field, the King may take goods from the subject; such a danger and such a necessity ought to be in this case, as in case of a fire like to consume all without speedy help, such a danger as tends to the overthrow of the kingdom.

Sir Humphrey Davenport, also advising in favor of Hampden, said (pp. 1214, 1215):

> I hold it real that when any part of the kingdom is in danger, actually in danger, or in expectancy of danger, and the same expressed by his writ, I agree the king may charge the subjects without parliament toward the defense thereof for "necessitas est lex temporis," in vain to call for help when the enemy is landed. Clearly I hold the King to be the sole judge of the danger. And the danger being certified by his majesty, I hold it not traversable; and in such a case he may charge the subject without parliament, so that the very cause be effectually expressed upon the records, that the kingdom was in danger.

An observation in Dicey's Law of The Constitution, recent work by an English author, at page 289, seems to deny such power to the British sovereign in England only, not elsewhere in the Kingdom, and cites as authority Wolfe Tone's case (27 St. Tr., 614). Tone was sentenced to death in Ireland by a military commission and committed suicide before arrival of the time of execution. On the day set for execution, and before Tone died, Mr. Curran, his attorney, appeared in the King's Bench and applied for a writ of habeas corpus, which being granted, was ignored by the military officers. In applying for the writ, Mr. Curran said (p. 625):

> In times when war was raging, when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me while I stand upon this sacred and immutable principle of the constitution—that martial law and civil law are incompatible, and that the former must cease with the existence of the latter.

Tone's case was like that of Milligan (4 Wall., 2). There was then no actual war nor proclamation thereof in Ireland. Tone had been captured at sea in a French vessel bound for Ireland on an expedition of invasion. By some authorities Wall's case (28 St. Tr., 51) is relied upon as being against the proposition laid down by the Federal Supreme Court. As commander of a garrison on the island of Goree, on the African coast, Wall had caused a soldier of his garrison to be beaten to death. That man's rights were governed by the general civil law and the British statutes relating to discipline of the army. His rights were invaded in neither a time nor a place of war. Wall was convicted of murder on an issue as to whether he had acted in good faith under belief of the existence of a mutiny, headed by his victim, or on a mere pretext and with malice.

But Mr. Dicey does not in fact deny the proposition. On the contrary, he admits it and cautions the student against the danger of being misled by nonobservance of the different senses in which the term "martial law" is used. (See p. 384.) He says martial law in the proper sense is unknown to the law of England (p. 283). Then he says:

> Martial law is sometimes employed as a name for the common-law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right or power is essential to the very existence of orderly government and is most assuredly recognized in the most ample manner by the law of England (p. 284).

Thus we find Mr. Dicey is merely denying the right of martial or military rule over citizens outside of the theater of actual war and admitting its existence in the war zone, just as do Judge Advocate General Leiber, Prof. Ballantine, and other writers on the subject, as will be hereinafter shown. He is distinguishing the war power of government from the peace power.

No doubt Patrick Henry and Thomas Jefferson were familiar with the British constitution and had carefully studied Magna Charta and the petition of right. They were, too, apostles of liberty as well as constitutional lawyers. The former ceased to be governor of Virginia June 1, 1779, and the latter, on that day, became governor, and held the office until June 12, 1781. While he was governor and no doubt potential as to the course of legislation as in other respects, the general assembly, in May, 1780, passed an act containing the following provision:

Be it enacted, That the governor be authorized, with advice of council, and he is hereby authorized and empowered, with such advice, to commit to close confinement any person or persons whatsoever whom there may be just cause to suspect of disaffection to the independence of the United States, and of attachment to their enemies; or to cause any such person to be removed to such places of security as may best guard against the effects of their influence and arts to injure this community and benefit the common enemy.

And be it further enacted, That in case of any insurrection within this Commonwealth, or the same shall be invaded by the enemy, either by land or water, that all and every person or persons within the same, who shall act as guides to, or spies for them, or who shall furnish the enemy with provisions or other necessaries, or who shall encourage desertion from the Army, or who shall dissuade or discourage the militia from opposing the enemy, or who shall give intelligence, aid, or comfort to the enemy, shall and they are here declared to be subject to the law martial as declared by Congress on the 20th day of September, 1776, in the fourth article of the sixth section and the eighteenth and nineteenth articles of the thirteenth section of the Continental Articles of War. And that for the trial of such offenders a court-martial, to consist of not fewer than 13 commissioned officers, one of whom shall be a field officer, shall be called by the county lieutenant or commanding officer of the militia in the county where such offense shall be committed, or in any other county of this Commonwealth, where such offended may be found. (10 Hen. Stat. at L., 310.)

In May, 1781, while Jefferson was governor, an act was passed containing this provision:

The governor, with advice of the council, is also hereby empowered to apprehend or cause to be apprehended and committed to close confinement, any person or persons whatsoever whom they may have just cause to suspect of disaffection to the independence of the United States or of attachment to their enemies, and such person or persons shall not be set at liberty by bail, mainprize, or habeas corpus. (10 Hen. Stat. at L., 414.)

To say there can not be a trial by a military commission under martial rule is a contradiction of authority everywhere.

Military commissions are courts organized under the international law of war for the trial of offenses committed during war by persons not in the land or naval forces. In the United States their jurisdiction is confined to enemy territory occupied by an invading army, or at least to those sections of the country which are properly subject to martial law, and their authority ceases with the end of the war. (40 Cyc., 391.) By a practice dating from 1847 and renewed and firmly established during the Civil War military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders.

Their authority is derived from the law of war, though in some cases their powers have been addded to by statute. Their competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of Attorney Generals. During the Civil War they were employed in several thousand cases; more recently they were resorted to under the reconstruction act of 1867; and still later one of these courts has been convened for the trial of Indians as offenders against the laws of war. (Digest of Opinions of the Judge Advocate General of the Army by Howland, p. 1066.)

The jurisdiction of a military commission is derived primarily and mainly from the law of war, but special authority has in some cases been developed upon it by express legislation, as has already been noticed. Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, either (1) in the enemy's country during its occupation by our army and while it remains under military government, or (2) in the locality not within the enemy's country or necessarily within the theater of war, in which martial law has been established by competent authority. The classes of offenses are (1) violation of the laws of war. (2) Civil crimes which, because the civil authority is superseded by the military and the civil courts are closed or their functions suspended can not be taken cognizance of by the ordinary tribunal. In other words, the military commission, besides exercising under the laws of war its jurisdiction of offenses peculiar to war, may act also as a substitute for the time for the regular criminal adjudication of the State or district. (Dig. Opin. Judge Adv. Gen., sec. 1680, McClure.) Of the ordinary crimes taken cognizance of under similar circumstances by these tribunals, the most frequent were homicides, and after these robbery, aggravated assault and battery, larceny, receiving stolen property, rape, arson, burglary, riot, breach of the peace, attempt to bribe public officers, embezzlement and misappropriation of public money or property, defrauding or attempting to defraud the United States. * * * Not unfrequently the crime, as charged and found, was a combination of the two species of offenses above indicated. As in the case of the alleged killing, by shooting or unwarrantably harsh treatment, of officers or soldiers, after they had surrendered or while they were held in confinement as prisoners of war, of which offense persons were in several cases during the Civil War convicted by military commissions under the charge of "murder in violation of the laws of war." (Dig. Opin. Judge Adv. Gen. Howland, p. 1071. See also McClure's Dig. Judge Adv. Gen. Opin., secs. 1680, 1681, 1682, 1683, and 1684.)

A military commission may sit and act in a community in which the civil courts are also acting.

From the jurisdiction, however, of military commissions under the circumstances above indicated, are properly excepted such offenses as are within the legal cognizance of the ordinary criminal courts, when, upon the establishing of military government or of the status of martial law, such courts have been, by express designation or in fact, left in full operation and possession of their usual powers. Thus, during the considerable periods of the war, pending which the District of Columbia was practically placed under a mild form of martial law, ordinary criminal offenses committed therein by civilians or military persons, of which there was not expressly vested by statute a jurisdiction in military courts concurrent with that of the civil tribunals, were in general allowed to be taken cognizance of by the latter, the same being at no time seriously interrupted in the exercise of their judicial functions. (McClure's Dig. J. Adv. Gen. Opin., sec. 1685.) Though a military commission is a military court, its jurisdiction is not confined to military persons. It extends to citizens as well as soldiers. That citizens may be brought within the exercise of their power is revealed by the reason for their constitution. Courts-martial do not extend to citizens. As, in the exercise of military government, it often becomes necessary to rule, govern, and punish citizens and the powers of courts-martial established by law, not by the will of the commander, do not reach such cases, a military commission to deal with citizens in the war area is necessary. The general orders issued during the Civil War contained nearly 150 cases of women who were tried by military commissions. (Dig. J. Adv. Gen. Howland, p. 1067, note 6.) Of course they were not soldiers or in any way included in the land and naval forces of the United States or the militia.

Although there is no express provision of the Constitution or acts of Congress authorizing military commissions, yet such commissions are tribunals now

as well known and recognized in the laws of the United States as the court-martial. They have been repeatedly recognized by the executive, legislative, and judicial departments of the Government as tribunals for the trial of military offenses. But while military commissions are thus recognized, such a commission is not a court within the meaning of the fourteenth section of the judiciary act of 1789, nor is the authority exercised by it judicial in the sense in which judicial power is granted to the United States. A military commission, unlike a court-martial, is exclusively a war court; that is, it may legally be convened and assume jurisdiction only in time of war or of martial law or military government when the civil authority is suspended. Its jurisdiction is ordinarily limited to the theater of war or of military occupation. Its jurisdiction extends to persons connected with the army of the enemy, acting as spies or violating the rules of war; to the inhabitants of the enemy's country held by an army of occupation; to the inhabitants of places under martial law; and to members of the Army of the United States, or civilians serving it in the field, who have committed offenses not within the jurisdiction of a court-martial. The offenses cognizable by such a tribunal comprise violations of the laws and usages of war, breaches of military orders or regulations not within the jurisdiction of courts-martial, and criminal offenses cognizable by the ordinary criminal courts and which would be tried by such courts if unobstructed in the exercise of their jurisdiction. (20 A. & E. Enc. L., 660–661.) Military commissions are courts organized under the international law of war for the trial of offenses committed during war by persons not in the land or naval forces. In the United States their jurisdiction is confined to enemy territory occupied by an invading army, or at least to those sections of the country which are properly subject to martial law. (40 Cyc., 391.)

Against such judicial construction and declarations of power, the speculations of lawyers and publicists, when in conflict with them, avail nothing; but, as we endeavored to show, in the opinion in the former cases, there is no such conflict; or, at least, very little. We repeat that Judge Advocate General Leiber and Prof. Ballantine, relied upon as such authority, in their two articles referred to in the decision in the Nance and Mays cases, clearly mark the distinction between executive power in the area of military operation and in pacific territory. Of the case of Luther *v.* Borden, cited as authority in the Moyer case, as late as the year 1908, for power in the executive of a State to declare a state of war and thereby set aside judicial powers, Gen. Leiber said:

> When the legislature of Rhode Island made use of it in 1842 it was probably intended to have no more definite meaning than that the militia of the State was to use its military power to suppress the enemies of the State. It was an authorization to do what was done when the military officer broke into the house of one of the enemies of the State in order to arrest him. He was a public enemy against whom the military power had been called out. It is evident that this is not the kind of martial law which we have been discussing.

The purpose of his article was to define the powers of the executive in the use of the military forces outside of the war zone and in territory considered loyal is contradistinguished from the territory of the public enemy. Prof. Ballantine, after having discussed the subject of such power, "In time of peace," and endeavored to define its limits, passes to the second division of his article, executive power "In time of war," and then proceeds as follows:

> The question remains whether we may have Federal martial law by virtue of the "war power" during invasion or insurrection in domestic territory. In war the enemy, be he a foreign one or a rebel to whom the status of belligerent has been given, has no legal rights which the invader must respect except those which international law recognizes. When a civil contest becomes a public war, all persons living within hostile limits become ipso facto enemies by their residence in enemy territory. An army in the enemy's country is thus governed by the law of war, and officers and soldiers are responsible only to their own government.

Having said this he immediately returned to the status of citizens in domestic territory outside of the rebellious area, saying:

> But in domestic territory the status of the Army is entirely different. The civil rights of citizens are not suspended but remain the same as in peace, both in districts near to and remote from the theater of actual warfare.

Observe that he does not say "remain the same in the theater of actual warfare." His next observation is that—

> The occurrence of hostilities does not vary the position of the citizen or deprive him of the protection of the Constitution, unless the army is in the position of a foreign invader and the country is ruled from without, acquiring the status of enemy territory.

Then he sites Dow *v.* Johnson (100 U. S., 158). He is still talking of the rights of citizens outside of the war zone, but Dow *v.* Johnson expressly decides that the rebellious territory is enemy territory and subject to military rule. Obviously he cites this only as marking the difference between executive power in the theater of war in an instance of rebellion and executive power in the same country outside of the theater of war. His criticism of the admission in Ex parte Milligan that, in time of war, there may be occasions when martial law can be properly applied, and of the decision of the English privy council in a recent case, Ex parte D. F. Marais, is not authority against the position here taken. In this he states what he thinks ought to be the law, but admits that it is not the law. Thus he says Ex parte Milligan declares that military authority of necessity supersedes the civil authority in foreign invasion or civil war on the theater of active military operations: and also that, in the late British-Boer War, the English privy council rendered a decision, holding the fact that some tribunals had been permitted to pursue their ordinary course was not conclusive that war was not raging.

For his position, in so far as it seems to conflict with the admitted authority against it, he cites Mitchell *v.* Harmony (13 How., 115). That was an action for a wrong done by a military officer in the exercise of military power and authority in foreign territory, Mexico, in time of actual war. The action was brought long after the war had closed, and in the courts of the United States, and the decision asserts no more than that military officers are liable for wrongs done in the exercise of military power, and that they are governed and limited in respect to the acts they may do by the usages of war as understood in international law. The case is no authority for the position that the courts may supersede or arrest the executive arm of the government while engaged in the conduct of a war of invasion or the suppression of an insurrection or rebellion, and here again it would be unjust to him to read his criticism of the Milligan case as the assertion of such a claim. He means no more than that on the theater of war power can not be exercised beyond that allowed by the usages of civilized warfare, and that after the return of the army from its foreign war, or the restoration of peace, an officer acting in violation thereof may be civilly or criminally liable. He neither says nor intimates, nor does his language imply, that the civil courts may give redress in any form or exercise any power in the enemy country, and Dow *v.* Johnson, cited by him, expressly denies any such power in any court of any country.

Stating in his conclusion what the law is, not what he thinks it ought to be, he says:

> Where the army is not invading enemy territory of a recognized belligerent, but is in its own territory, the military authorities remain liable to be called to account, either in habeas corpus or any other judicial proceeding, for excess of authority toward citizens, no matter whether it occurred in propinquity to the field of actual hostilities or while the courts were closed or after a proclamation of marial law.

Propinquity means not in the field of actual hostilities, but nearness to it, or in the neighborhood of it, and his stated premise to the conclusion is:

> Where the army is not invading enemy territory of a recognized belligerent.

In seeking his meaning we can not cut this out. To do so would be unjust to him. It would make him say what he neither says nor means.

In support of the denial of the existence of Executive power, admitted and asserted by the foregoing authorities, numerous inapplicable decisions are cited, some of which were analyzed and explained in the opinion in the Nance and Mays cases.

The Milligan case (4 Wall., 2) involved the rights of a man residing and arrested in a State and county in which there was no war and had not been, and in which the courts were not only sitting but absolutely unobstructed in the exercise of their powers. In his argument in that case Mr. Garfield marked the distinction between the sections, the war area and in the pacific domain. After having shown what provisions Congress had made for arrest, detention, and trial of disloyal people found in pacific territory, he said:

> But Congress did far more than to provide for a case like this. Throughout the 11 rebellious States it clothed the military department with supreme power and authority. State constitutions and laws, the decrees and edicts of courts, were all superseded by the laws of war.

If the Constitution of the United States forbade supremacy of the military over the civil power in every part of the national dominion, no matter what its condition, and thus effectually precluded supremacy of military power as is contended, the Congress of the United States could not have done what Mr. Garfield said it did in the 11 rebellious States. Congress can no more override the Constitution than the President can. He admits that such Executive power was exercised in those States, and then, showing the State of Indiana to have been pacific territory, lying wholly outside of the theater of war, he denied the existence of any act of Congress authorizing a trial by a military commission of a citizen residing and arrested outside of the war area. Moreover, the entire Supreme Court, its dissenting justices as well as the others, declared that Congress had not authorized the application of martial law to a State like that of Indiana, nor attempted to do so. Chief Justice Chase, for the minority of the court, said:

> We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them.

Mr. Justice Davis, delivering the majority opinion, said:

> It is not pretended that the commission was a court ordained by Congress. * * * But it is said the jurisdiction is complete under the laws and usages

of war. * * * They can never be applied to citizens in States which have upheld the authority of the Government, and where the courts are open and their process unobstructed.

As Indiana was not in a state of actual war, nor under a military government by proclamation, authorized by Congress, it is clear that the Milligan case is no authority against the exercise of executive power in territory legally declared to be in a state of war. In re Kemp (16 Wis., 382) is governed by exactly the same principles. So is Ex parte Merryman (17 Fed Cas., No. 9, 487). In re Henderson (11 Fed. Cas., No. 6, 349) involves the question whether a mere contractor to furnish supplies to the Government for the use of the military service shall be tried by court-martial. It is not contended that any of the elements justifying substitution of the military for civil government were present. Hence the case has no possible application to the question here under consideration. The nature of the Egan case (5 Blatch., 319) appears from the statement found in the syllabus:

Where a person was tried by a military commission, in South Carolina, in November, 1865, for a murder committed in September, 1865, and was convicted and sentenced to imprisonment for life in the penitentiary at Albany, N. Y., hostilities having terminated and the rebel army having surrendered to the authorities of the United States some seven months before the trial: Held, on a habeas corpus, that the prisoner was entitled to be discharged on the ground that the conviction was illegal for want of jurisdiction in the tribunal.

In the opinion of the court there was not, at the time of the trial and conviction, a state of war in the community in which it occurred. Johnson *v.* Jones (24 Ill., 143), as regards the situation of the prisoner, was like that of the Milligan case. He had been arrested and resided in pacific territory. In Johnson *v.* Duncan (6 Am. Dec., 776) the validity of a proclamation of martial law was denied on the ground of lack of authority in the commanding officer to proclaim it, Congress not having conferred it. The principle of that case is the same as that of the Merryman case. Ela *v.* Smith (5 Gray, 121) did not arise in a state of war, nor under a proclamation thereof. The mayor of a city merely called upon the volunteer militia to assist him in executing the civil law. Whether, in case of a rebellion or insurrection, the governor of a State may use the military power for its suppression and, in doing so, temporarily substitutes military law or rule for the civil law, is neither discussed nor adverted to in the opinion.

It is true that in Tucker on Constitutions the exposition of this doctrine by the Supreme Court of the United States is criticized, but the author admits the interpretation is at variance with his views. Speaking of certain cases in which the court announced its conclusion, at page 639, he says:

It is therefore pertinent to observe in respect to them, that they overthrew existing republican forms of government in every State of the Confederacy, and that government in Virginia which Congress and the President had recognized in the act dividing the State of Virginia which resulted in the admission of West Virginia to the Union; and the government of Virginia thus recognized was put in possession of power at the city of Richmond after the war as the lawful government of Virginia. The reconstruction laws overthrew that government which Congress itself had set up, and substituted a military government with the judicial power subject to its control. Military commissions were inaugurated for the trial of citizens in other States, and conventions were called under regulations prescribed for suffrage by Congress, and new constitutions

were adopted and new forms of government established. It is hardly a question that these laws, which overthrew the form of government established by the State, and refused to restore it as the legitimate form of government, and set up a military despotism in its place, were not a guaranty of a republican form of government to the States, but guaranteed the overthrow of all republican forms of government and the adoption of a constitution against the will of its people and under the dictation of military power.

This criticism necessarily admits all that is claimed in this opinion as to the construction of the Federal Constitution by the Supreme Court of the United States, namely, that, in belligerent territory, Congress had the power, in effecting a restoration of the constitutional guaranties, to set up provisionally such a government as in their opinion would ultimately bring about that result. It is testimony to the existence of the law by one who challenges its soundness.

Willoughby on the Constitution, at sections 726 and 727, in speaking of the use of the military under the control and direction of civil officers in the enforcement of a civil law, citing Ela *v.* Smith (5 Gray, 121), denies that such use of the military forces constitutes martial rule or military government, and in this may be correct. At sections 728, 729, 730, 731, and 732 he discusses martial law and military government. Here he criticizes the opinion of Chief Justice Taney in Luther *v.* Borden, and adopts the views of Justice Woodbury in a dissenting opinion. His criticism of the majority opinion necessarily admits conflict between his personal view and that of the court, in which case, of course, the opinion of the court prevails and must be regarded as law. He also finds fault with the opinion of Mr. Justice Holmes in the case of Moyer *v.* Peabody, but here again the views of the court must prevail. Speaking of martial law in time of war, at section 732, he says:

> It has already been learned that in war the enemy, be he a foreign one or a rebel to whom the status of belligerent has been given, has no legal rights which those opposed to him must respect. When a civil contest becomes a public war all persons living within limits declared to be hostile become ipso facto enemies and subject to treatment as such. * * * Upon the actual scene of war there is no question but that for the time being the military authorities are supreme, and that these may do whatever may be necessary in order that the military operations which are being pursued may succeed. Here martial law becomes indistinguishable from military government. * * * The necessities being great and extraordinary, the executive and administrative—that is to say, the military—action that will be justified is correspondingly extensive.

In section 733 he deals with the rights and powers of the executive and of citizens in time of war, but outside of the war area. Here he classes the Milligan case as we do. Under this head he says:

> Under the stress of military exigency upon the actual theater of war such civil guaranties as the writ of habeas corpus, immunity from search and seizure, etc., may, of course, be suspended. As to this there is no question. There is, however, a serious question whether when war exists these rights may, by legislative act or executive proclamation, be suspended in regions more or less remote from active hostilities. This question was raised and carefully considered in the famous Milligan case, in which the Supreme Court was called upon to pass upon the authority of a military commission during the Civil War to try and sentence, upon the charge of conspiracy against the United States Government, one Milligan, who was not a resident of one of the rebellious States, nor a prisoner of war, nor ever in the military or naval service of the United States, but was at the time of his arrest a citizen of the State of Indiana, in which State no hostile military operations were then being conducted.

As the Government of the United States is one of enumerated powers, the tenth amendment to the Constitution, declaring that—

> The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States, respectively, or to the people—

it was perhaps more difficult to find authority in the President of the United States and in the Congress thereof to suppress a rebellion and, in the exercise there the power, to establish military government and administer martial law, than it is to find the same power in the executive of a State, to which there is reserved all power not delegated to the National Government nor prohibited to the States. The Federal Constitution makes the President Commander in Chief of the Army and Navy and of the militia of the States, when called into service, but he is not authorized by express terms to use the Army and Navy or militia, at his own volition, to suppress an insurrection or repel an invasion. That power is conferred upon Congress, but in the most general terms. By clause 15 of section 8 of Article I, Congress is authorized—

> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, or repel invasions.

By clause 11 of the same section it is authorized—

> To declare war, grant letters of marque and reprisal, and make rules for captures on land and water.

In conferring these powers upon Congress the imposition of restraint and limitation upon the exercise thereof was carefully avoided, to the end that the power might be exercised efficiently. It is apparent that, in defending its life against a foreign or domestic foe, the Government must be left much in the situation of an individual in the exercise of the right of self-defense. On this subject Alexander Hamilton said:

> The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. * * * This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it and may be obscured, but can not be made plainer by argument or reasoning. The means ought to be proportioned to the end, the persons from whose agency the attainment of any end is expected ought to possess the means by which it is to be attained. (Federalist, No. 23.)

Mr. Madison expressed the same idea in the following terms:

> It is vain to impose constitutional barriers to the impulse of self-preservation. It is worse than in vain, because it plants in the Constitution itself necessary usurpations of power. (Id., No. 41.)

Likewise John Adams, speaking long after the formation of the Constitution, said:

> All the powers incident to war are by necessary implication conferred upon the Government of the United States. There are, then, in the authority of Congress and of the Executive two classes of powers altogether different in their nature and often incompatible with each other—the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.

Thus, in the spirit of the framers of the Constitution, the Supreme Court of the United States spoke long years after those who had formed it had passed away. They died before the anticipated ex-

igency arose, but when it came the administrators of government, including the judicial branch thereof, had no difficulty in finding in the Constitution the war power in all its might and strength, notwithstanding the express guaranties of life, liberty, and property, trial by jury, and others insisted upon now as precluding the existence of such implied power. It included suspension and overthrow of the civil power in the war zone, courts or no courts, ignored the constitutional guaranties, subordinated private right to the exigencies of the occasion, justified the arrest and imprisonment of citizens, and substituted military commissions for constitutional civil courts, with power to try, convict, and punish citizens for offenses of all kinds.

Since the Federal Constitution has not inhibited military government on the theater of warfare in which the military power of the Federal Government is engaged, such government being, by necessary implication, contemplated and authorized by the Constitution itself, under such circumstances no reason is perceived, nor has any been advanced in the argument of this case or any other, why military government in a State, justifiable upon the same ground of necessity and by implication authorized by the State constitution, should be regarded as a violation of the Federal Constitution. On the contrary, the Federal Supreme Court has itself on more than one occasion declared such State action not to be a violation of the National Constitution, nor of the guaranties of due process of law, trial by jury, and the equal protection of the laws. Such is the effect of the decision in Moyer *v.* Peabody (212 U. S., 78), saying:

> Public danger warrants the substitution of executive process for judicial process.

The substitution referred to and held good in that case was by the executive of a State under a State constitution. In that case—Luther *v.* Borden (7 How., 1)—in which Chief Justice Taney asserted the power of a State to declare war in the suppression of an insurrection and for the establishment and maintenance of its authority, was cited with approval. Holding the prisoner not entitled to his discharge on a writ of habeas corpus, the Supreme Court of Colorado said:

> In reaching this conclusion we are not unmindful of the argument that a great power is recognized as being lodged with the chief executive, which might be unlawfully exercised. That such power may be abused is no good reason why it should be denied. The question simply is, Does it exist? If so, then the governor can not be deprived of its exercise. The prime idea of government is that power must be lodged somewhere for the protection of the Commonwealth. For this purpose laws are enacted, and the authority to execute them must exist, for they are of no effect unless they are enforced. Neither is power of any avail unless it is exercised. Appeals to a possible abuse of power are often made in public debate. They are addressed to popular fears and prejudices, and often given weight in the public mind to which they are not entitled. Every government necessarily includes a grant of power lodged somewhere. It would be imbecile without it. (In re Moyer, 35 Colo., 159, 169.)

This declaration of power by a State court was sustained by the Supreme Court of the United States. In Luther *v.* Borden (7 How., 1) Chief Justice Taney said:

> And unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other Government. The State itself must determine what degree of force the crises demands.

He then said, in substance, that if the government of Rhode Island had made a declaration of martial law there was "no ground upon which" the "court could question its authority." Proceeding, he further observed:

> It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition.

This proposition the court approved and applied in Moyer *v.* Peabody, cited. Argument against so plain a declaration is necessarily futile.

In the main State constitutions are framed on the plan of that of the Federal Government, and all of them contain in some form the same power, right of self-preservation, as that preserved by the Federal Constitution. By it the power is vested in Congress for execution by the President. In most of the State constitutions it is vested in the governor for some reason, possibly because the exercise thereof in a State is considered a matter of less consequence than by the Federal Government, for the reason that no despotic or arbitrary government can be permanently established in any State, since the Federal Constitution guarantees to every State a republican form of government, and any attempt by any governor to establish himself as a dictator in a State would be promptly thwarted by the exercise of the powers of the Federal Government. Hence, there is less danger in entrusting such power to a State governor than there would be in entrusting it to a President. Other reason may be found in a desire to avoid the expense incident to the convening of the legislature to confer upon the governor the power to suppress an insurrection or repel an invasion. Whatever the reason for it, this difference exists, and the power vested in the governor of this State by the terms of the constitution is the same regarding the maintenance of a State government as that vested in Congress by the Federal Constitution regarding the maintenance of the National Government. Indeed, it is vested by the use of the same general terms. In the Nance and Mays cases we said an express grant of power to use the military forces to suppress insurrection or repel invasion was a grant of power to suppress insurrection in the manner in which that has usually been done in other States, countries, and times. So says the Federal Supreme Court of such terms used in the constitution of Colorado. In Moyer *v.* Peabody Mr. Justice Holmes said:

> That means that he shall make the ordinary use of the soldiers to that end.

Though harsh and obviously at variance with the spirit of our institutions, under normal conditions, this principle finds its counterpart in a general principle of the law, applicable to lesser matters than the preservation of the government or the maintenance of the laws of a State. It is, indeed, unfortunate that men's lives should be sacrificed and inconveniences and hardships imposed, in the exercise of such power upon noncombatants, but this is not the only instance in which the common law recognizes the same principle. If a citizen is assailed by another with felonious intent, he may defend himself to the extent of taking the life of the assailant and the act is justifiable. Any citizen is authorized by the common law to take upon himself, if the occasion justifies it, the vindication of the law and take the life of another to prevent him from committing a felony.

Here a private citizen is authorized to exercise power the same in character and kind, to save another individual or his property, as that vested in the governor of the State. As the law admittedly authorizes any citizen, no matter what his character or station in life or the degree of his intelligence, to take life to prevent the commission of a felony, is it inconsistent to say the governor of a State, as the chief conservator of the peace, selected as such for his superior wisdom, character, and intelligence, may exercise the same kind of power for the accomplishment of a higher purpose? Officers of the law, such as constables and sheriffs, in the execution of process for arrest and imprisonment, may oppose resistance, using such force as is necessary, even to the taking of life. (Whar. Crim. L. (11th ed.), sec. 528, p. 718: Murphy on Sheriffs, secs. 1160 and 1129; McClain on Crim. L., sec. 298.) So, in pursuing a felon or preventing an escape, an officer may kill if necessary. (Whar. Crim. L., secs. 532, 533.) If officers of the law, when engaged in the preservation of the peace, find it necessary to take life, such homicide is justifiable. (Id., sec. 534.)

In all these instances, citizens are deprived of life without a trial by jury, notwithstanding the constitutional inhibition of deprivation of life without trial by jury. Likewise there are many instances in which a man may be deprived of his property without a jury trial, notwithstanding a similar constitutional inhibition. Property of a citizen may be taken out of his possession by the drastic remedy of attachment. Though he may have a trial by jury as to the existence of the debt for which the attachment is issued, and as to the existence of the grounds thereof, the property is first taken out of his possession. He is deprived of the use of it, and this amounts to a deprivation of property, without a trial by jury. So there are numerous instances in which jurisdiction of causes involving title to property is vested in the courts of equity, not bound to give a trial by jury at all. Throughout all this broad country men are arrested and committed to prison by justices, police magistrates, and other authorities, daily and by thousands, on accusations of all sorts of offenses, and thus in a sense deprived of their liberties without the intervention of juries, notwithstanding the constitutional inhibition of deprivation of liberty without a trial by jury. There is no exception of these cases from the letter of the guaranty in terms or by name, yet everybody recognizes it.

These illustrations show conclusively that the constitutional guaranties are to be read and applied in the light of their purposes, which falls far short of the letter. They prove beyond question that there are exceptions from the strict letter of those guaranties. As these undoubtedly exist, may not others also? Their existence absolutely and emphatically condemns the theory of strict adherence to the letter of these constitutional provisions. As a citizen may take into his own hands the whole power of the law, as its champion and defender, and take life, to prevent the consummation of a single threatened felony as well as to save his own, or merely to prevent great bodily harm, as a matter of self-defense, and a petty officer, in effecting an arrest or pursuing a felon, may take life, all single instances and matters of comparatively small moment, notwithstanding the literal guaranties of the constitution from which they are not expressly excepted, does not the assertion of power in the execu-

tive of a State, its chief conservator of the peace, to use military power as a substitute for the civil power, when the whole fabric of government of the State is endangered, the laws trampled under foot, all the constitutional guaranties violated and set aside, the lives and property of thousands in jeopardy, and the civil authorities wholly unable to cope with or resist the assault, stand upon the same principle of necessity? The constitution does not set it all out in detail, but it uses terms broad enough to include it, unless restrained by the clauses relied upon as imposing such restraint. Neither does the constitution preserve in terms the right of self-defense or the right to kill in prevention of felonies or arrest of a felon or prevention of his escape, but it uses terms broad enough to include these rights. In both cases the application of the settled rules of construction make the general terms so used include the means necessary to the accomplishment of the organic purpose, in restraint of the letter of other classes having different purposes. This construction vests tremendous power in the governor, and its exercise may produce frightful consequences, but, as in the other cases mentioned, it is the necessary means of prevention of still worse results. Thus government is not perfect. It can not be in the nature of things.

The clause inhibiting suspension of the writ of habeas corpus is relied upon as an element differentiating our constitution from that of the Federal Government and those of some other States. With this phase of the case we dealt at some length in the opinion in the Nance and Mays cases. In addition to what was said there, we observe that the guaranty of the privilege of the writ of habeas corpus adds nothing to the guaranties of due process of law, trial by jury, cognizance of causes by civil courts, and supremacy of the civil over the military power. This writ does not confer rights. It only vindicates such rights as are given by law. It is a remedy, not a law creating or declaring rights. The courts are always open to applications for the writ and always grant it upon proper application, but it does not follow that every one who applies for it or makes the necessary affidavit is entitled to be discharged. It may be the duty of the governor and every military officer of the State to recognize the writ and make return thereto, but that is not conclusive of the question whether the applicant shall be discharged or accorded such other relief as he claims. If on the return it appears that under some power vested by the constitution or a statute the governor or such other officer as has the applicant under arrest or imprisoned has power and authority to detain or imprison the applicant he can not be discharged. In seeking the vindication of constitutional rights on a writ of habeas corpus the applicant is bound by such power and authority as are vested in the person by whom he is detained. He can not be discharged unless illegally restrained of his liberty, and he is not so restrained if the law authorizes or justifies his detention, whether the officer be a constable, a police officer, the military forces, or the governor of the State. In other words, the writ adds nothing whatever to the guaranties or rights vested by law, nor does the guaranty of the privilege thereof in any way cut down or limit the rights and powers vested in officers by law, constitutional or statutory, either in express terms or by implication.

But it is said there can be no war in a State. It suffices to say, in response to this, that Luther *v.* Borden and Moyer *v.* Peabody expressly decide that the Constitution of the United States does not inhibit the declaration by a State of a state of war within its own borders by proper authority. State courts other than this have asserted the same proposition. (In re Moyer, 35 Colo., 159; Commonwealth *v.* Shortall, 206 Pa., 165.) In the latter case the court said:

> The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also valid.

Ex parte Moore (64 N. C., 802) also declares a governor of a State may proclaim a state of war and recognize the status of belligerency. The opinion in that case is consistent with those of the Supreme Court of the United States except in one respect. The court fell into the fallacy above noted respecting the clause forbidding suspension of the privilege of the writ of habeas corpus and said it denied power in the governor to detain prisoners and required him to turn them over immediately to the civil authorities for trial. Plainly there is nothing in the law securing the privilege of the writ of habeas corpus that confers any such right. It must be found, if at all, in some provision or principle.

As to what constitutes an insurrection or state of war or rebellion the authorities are fairly clear. In Pennsylvania and Colorado the occasions of the declaration, adverted to in Commonwealth *v.* Shortall and Moyer *v.* Peabody, were very similar to the one calling for the proclamation here involved. A similar situation, growing out of a different cause, was the basis of the proclamation in North Carolina. These authorities show that it need not take the form of an attempt to set up a new government by name.

> The rule of the common law is that when the regular course of justice is interrupted by revolt, rebellion, or insurrection so that the courts of justice can not be kept open civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true, so that when the courts of a government are open it is ordinarily a time of peace. But though the courts be open, if they are so obstructed and overawed that the laws can not be peaceably enforced, there might perhaps be cases in which this converse application of the rule would not be admitted. (18 Fed. Cas., case No. 10755a.) A state of actual war may exist without any formal declaration of it by either party, and this is true of both civil and foreign war. A civil war exists and may be prosecuted on the same footing as if those opposing the government were foreign invaders whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection so that the courts can not be kept open.

These definitions are given in prize cases and the political status ascertained and determined as the basis of settlement of property and commercial rights. They are not conclusive as to the state of affairs when viewed from other standpoints. The question we have here is an entirely different one—insurrection or rebellion in the sense of justification of a declaration of a state of war by competent authority. War is not necessarily a rising of the people in an armed effort to

establish a rival government. As to what constitutes a levying of war under a statute against treason, a very similar one to the question we have here, Sir Matthew Hale says (Pleas of the Crown, Vol. I, p. 149):

What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, the de facto they commit the act they intend, that makes a levying of war, for then every riot would be treason, and all the acts against riotous and unlawful assemblies, as 13 H. 4 cap. 7. 2 H. cap. 8. 8 H. cap. 14 and many more had been vain and needless; but it must be such an assembly as carries with it speciem belli, as if they ride or march vexillis explicatis, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to define them all particularly.

On page 152 he says the levying of war against the King is of two kinds, express and interpretative. Of the latter he said:

Constructive or interpretative levying of war is not so much against the King's person as against his government; if men assemble together more guerrino to kill one of His Majesty's privy council, this hath been ruled to be levying of war against the King. (P. 16 Car. 1. Cro. 583.) Bensted's case before cited, and accordingly was the resolution of the House of Lords 17 R. 2. Talbot's case above mentioned. So, in the case mentioned by my Lord Coke, in the time of H. 8 Co. P. C., p. 10, levying war against the statute of laborers and to enhance servants' wages was a levying of war against the King; and although levying of war to demolish some particular inclosures is not a levying of war against the King (Co. P. C., p. 9), yet, if it be to alter religion established by law, or to go from town to town generally to cast down inclosures, or to deliver generally out of prison persons lawfully imprisoned, this hath been held to be levying of war against the King within this act, and the conspiring to levy war for those purposes treason within that clause of the act of 13 Eliz. cap. 1., as was resolved in Barton's case and Grant's case, above mentioned, and the like resolution was in the case of the apprentices that assembled more guerrino to pull down bawdyhouses.

That the condition of the courts is not the sole criterion seems to be very well settled, when the question is justification of a declaration of war. In Elphinstone *v.* Bedreechund (1 Knapp, 316) the statement of the case shows some of the civil courts were open when the transaction out of which the case grew occurred. The syllabus says:

The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional government and that courts of justice under the authority of that government were sitting in it for the administration of justice, do not alter the character of the transaction.

In Marais *v.* General Officer, decided in 1902, the English Privy Council, presided over by the lord chancellor of England, reasserted this doctrine, saying:

The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging.

Though civil courts are open, as was shown in that case, their jurisdiction is denied when it essays to interfere with executive action. On this point the lord chancellor said:

The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities.

Speaking of this decision, in an article reproduced in 18 Law Quarterly Review, 1902, Sir Frederick Pollock, an eminent English authority, said:

> The judgment involves the further position that neither an application for summary release from extraordinary arrest nor an action for anything done as an extraordinary act of necessity will be entertained by the ordinary courts during the continuance of a state of war in the jurisdiction, when the court is satisfied that a responsible officer acting in good faith is prepared to justify the act complained of. I do not know that this is seriously objected to.

In the following terms he goes beyond the doctrine of the Milligan and Marais cases and the position taken here:

> There may be a state of war at any place where aid and comfort can be effectually given to the enemy, having regard to the modern conditions of warfare and means of communication.

The declaration in Moyer *v.* Peabody, cited, averred that the courts of Colorado were open and could have tried the petitioner at the time of his detention by the governor, and the United States Supreme Court held the circumstances insufficient to make a good declaration against the governor for false imprisonment. In Dow *v.* Johnson (100 U. S., 158) there was involved the judgment of a civil court, open and running in New Orleans, by virtue of the permission of the military commander. Nevertheless its judgment was declared void by the United States Supreme Court for want of jurisdiction. Of the civil courts, Mr. Justice Fields said in that case:

> They are considered as continuing, unless suspended or superseded by the occupying belligerents.

This necessarily implies power to suspend them or supersede them. Hence it follows that, although for some purpose they are open, in some respects their service efficient, they are clearly not inconsistent with martial rule or a declaration of war. In Moyer *v.* Peabody, cited, the court said:

> Public danger warrants the substitution of executive process for judicial process. * * * As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a State law authorizing the governor to deprive citizens of life under such circumstances was consistent with the fourteenth amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case. Martial law is the temporary government and control by military authority of territory in which by reason of war or public danger the civil government is inadequate to the preservation of order and the enforcement of law. (40 Cyc., 387.)

What is inadequacy of the civil power, exercised by courts? Does it suffice for the purposes of government that the courts may fairly try civil cases or some classes of criminal cases, while the guns of civil conflict roar almost within their hearing, and blood flows and lives are in process of extinguishment, and those engaged in it can not be, or, at least are not, restrained by the ordinary criminal processes? Is this adequate government by the civil power? Under such circumstances, are not some of the guaranties of the Constitution, which all officers are sworn to enforce, set aside in point of fact as effectually as if the courts were not sitting at all and could not sit? Must the executive arm remain at rest, because all guaranties are not so set aside, as to all people or in all places? Reason and authority answer in the negative.

If insurgents or rebels must be turned over to the civil authorities as fast as seized, when the courts can not or will not try them, though sitting and performing other functions, the courts become, by reason of their existence, agencies or instrumentalities of resistance of the exercise of necessary executive power. Under the rights of continuance and bail given by the civil law or indulged by courts affected with sympathy, timidity, or fear, those arrested can be released to reengage in the conflict, and the courts themselves become passive or active, though incidental, factors in the maintenance of forcible resistance of law and order. Thus the construction insisted upon runs to a palpable absurdity as well as contravention of principles of sound public policy. A process of analysis leading to such results is condemned by rules of interpretation and construction recognized everywhere. (Hasson *v.* Chester, 67 W. Va., 278; In re Moyer, 35 Colo., 159.)

On this question authority is meager for the obvious reason that it is a political one, not subject to judicial review, the courts everywhere holding a declaration of a state of war by competent authority to be conclusive of the fact. Hence the reported cases show no instance of court interference with executive action as to that question.

Whether there was justification for the declaration of a state of war in this instance is not an open question. By all authority the declaration of a state of insurgency or war by competent authority is conclusive upon the court. (Luther *v.* Borden, cited; Moyer *v.* Peabody, cited; In re Moyer, 35 Colo., 159.) If, however, it were an open question we would be unable to say in view of the circumstances detailed in the returns there was not sufficient ground for the declaration. In the territory covered by the proclamation armed forces have been contendng with one another for nearly a year. Many persons have lost their lives, and property has been destroyed, railroad trains have been interfered with, execution of the law by the civil officers has been resisted and prevented by force of arms, and much worse results have been threatened. Though the courts of Kanawha County have been sitting outside of the district, nobody has been brought to trial, arrested, or indicted for any of these offenses. If the courts could have acted, they have not done so. What efforts have been made to enforce the laws and punish offenders are not fully disclosed, but the fact is nothing has been done. Why this state of affairs has been permitted to exist by those who ought to have suppressed it if it was within their power to do so is rather a collateral question. The interest of the State and of the general public imperiously demand termination of it, no matter what the cause.

The declaration of a state of war was in law and fact a recognition or establishment of belligerency and made the inhabitants of the military district technically enemies of the State, even though another executive might not have regarded the facts sufficient to warrant the action. Errors in decision do not destroy or establish lack of jurisdiction. This is a principle universally recognized.

Though Moyer *v.* Peabody, cited, Luther *v.* Borden, cited, and Commonwealth *v.* Shortall, cited, do not assert power or authority in the executive of a State under an executive declaration of military government in a portion thereof to try citizens by a military commission, the general principles asserted by all of these decisions fairly include it. In no way do they distinguish the exercise of this power

in a State from that of similar power in the Federal Government executed by the President under authority conferred by Congress. In the Shortall case the court said:

> What has been called the paramount law of self-defense common to all countries has established the rule that whatever force is necessary is also lawful. While the military are in active service in the suppression of disorder and violence their rights and obligations as soldiers must be judged by the standard of actual war.

In Luther *v.* Borden the court said:

> And unquestionably a State may use its military powers to put down an armed insurrection too strong to be controlled by the civil authorities. The power is essential to the preservation of order and free institutions and is as necessary to the States of this Union as to any other Government.

That case denies the right of a State to set up a permanent military government, but it admits the right of a State to exercise military power for self-preservation on exactly the same principle as that on which the same power has been shown to exist in the National Government.

Only one of the cases, Moyer *v.* Peabody, involves right of detention of a citizen under arrest and denial of his claim of right to immediate surrender for trial by the civil courts, and the Supreme Court of the United States justified his detention upon the same principles upon which military government and administration of martial law, as applied to citizens, is justified in the National Government. All of these cases assert the principle and none of them qualify or limit it. Hence none of them is authority against power in the executive of a State, in the suppression of an insurrection or rebellion, to cause persons to be tried by a military commission for offenses committed within the territory declared to be in a state of war, and we have found no authority of that kind except the Moore case (in 64 N. C., 802), in which the court, after having decided that the governor was bound to make immediate surrender of prisoners to the civil tribunals, admitted its inability to enforce the declaration and denied that its writs had any virtue or effect inside the military district.

As a result of these principles, views, and conclusions, we have two areas or sections in the State, by virtue of a declaration of a state of war in the district, in which the powers of government and the rights of citizens differ most radically. The tremendous power of the governor in the military district does not extend beyond the limits thereof. Nevertheless, he is the governor of the peaceable territory of the State and has such powers as are normally vested in him by the constitution and the laws, and any additional authority the legislature may have conferred upon him in pacific territory in the event of such exigencies, not violative of constitutional provisions. In the language of John Adams, the State has a peace power and a war power, both of which are now active. We construe the returns of the respondents as asserting, for the purposes of this case, the power of detention of the petitioners, not a right to try them by a military commission. Having shown the existence of a state of war in the area covered by the governor's proclamation, and the steps taken to suppress the insurrection and lawlessness in that territory, the returns say the petitioners have been largely instrumental in causing and encouraging the lawlessness, riot, and insurrection, and that their detention is, in the judgment of the executive, necessary in order to effectually suppress the same.

This sufficiently charges them with having willfully given aid, support, and information to the insurgents, the enemy, in a time of war, insurrection, and public danger, and section 6 of chapter 14 of the code confers upon the governor power to apprehend and imprison all such persons. Such acts may be done either inside or outside of the military district. Nothing in the terms of the statute limits the exercise of this executive power of apprehension and imprisonment to persons within the military district, and it is obvious that persons outside of such district may do as much or more than persons inside of it to defeat executive action looking to the suppression of the insurrection or rebellion. Hence there is no reason for such a limitation. On the contrary, there is good reason against it, wherefore we must say the legislature intended no such a limitation, and the statute contemplates such arrests and imprisonment of persons committing these acts outside of the military district.

We have just seen that this power of detention, as exercised by the governor of the State of Colorado, was sustained by the Supreme Court of the United States in Moyer *v.* Peabody. Moreover, we see no reason for saying it violates in any respect any of the constitutional guaranties. It is statutory authority in the governor, and if not in violation of the constitution it amounts to due process of law within the meaning of the fourteenth amendment to the Constitution of the United States. It contemplates imprisonment without a trial by jury, but not by judgment of conviction of a crime. The exercise of this power involves no change or status from citizens to convicts. It is therefore not a deprivation of liberty without a trial by jury within the meaning of the constitutional guaranties. Such apprehension and imprisonment are the same in principle as those of persons accused of crime. On all sorts of charges, from assault and battery to first degree murder, citizens are daily arrested and imprisoned to await examination, indictment, and trial. There may be imprisonment without a jury trial for contempt of court. (State *v.* Gibson, 33 W. Va., 97; Cooley Cons. Lim., 453.) Persons offending against city by-laws may be imprisoned without a trial by jury if the offense is not made a crime. (McGear *v.* Woodruff, 35 N. J. L., 213.) It was not the purpose of the framers of the Constitution to interfere with the course of the common law by the incorporation of this guaranty, and by that law persons guilty of petty offenses and contempt of court and accused of crime could always be imprisoned without a jury trial. (McGear *v.* Woodruff, cited; In re Rolfs, 30 Kans., 758.)

As this statute is a law conferring power upon the governor, action under which constitutes due process of law provided the statute itself is constitutional, a question about which we have no doubt, and, as the returns show the existence of a state of war, an insurrection, and certainly at time of public danger, each of which seems to have been made a condition precedent to the exercise of the power, the detention of these petitioners, although arrested outside of the military district, is, in our opinion, entirely valid and legal.

Hence discharges were refused, and they were remanded to the custody of the military authorities acting under the control and direction of the governor.

Petitioners remanded.

ROBINSON, Judge, dissenting:

May citizens accused of civil offenses be tried, sentenced, and imprisoned or executed by military commissions at the will of the governor of this State notwithstanding the civil courts having jurisdiction of the offense are open? This is the question made by the record in these cases. It is none other. Nor can it be reduced to any other. The question is not that of the power of the governor to use the militia to execute the laws, suppress insurrection, and repel invasion. That the governor has constitutional and statutory power so to use the militia, and thereby to arrest persons as far as it is reasonably necessary, no one will deny. But because the governor has this power must judicial construction run random and thrust upon the citizens of this State military courts for the trial of civil offenses, in the very face of the direct inhibitions against such procedure contained in our Constitution, and regardless of all constitutional guaranties?

Not a case cited in the majority opinion other than the former decision of the majority in the Nance and Mays cases, not an authority relied on by the majority in these present cases or those former ones, sustains the holding that citizens may be tried and condemned for civil offenses by military commissions at the unrestrained will of the executive when the courts having jurisdiction of those offenses are open and operative.

But whatever might be the law elsewhere our own constitution should control. The doctrine promulgated by the majority and that constitution can not stand together. They are totally at variance. By the most direct and explicit provisions the people of this State, when they adopted the constitution, supposed they had forever precluded insistence upon such arguments as the majority opinion puts forth. They meant to guard against such misconception of constitutional liberty as that into which the majority of the court has fallen. The people declared against the suspension of the constitution at any time, war or no war, on any plea whatsoever. Yet the majority of this court holds that it may be suspended whenever the governor by proclamation, right or wrong, sees fit to suspend it. The people ordained that the privilege of the writ of habeas corpus should never under any circumstances be suspended. Yet the holding of the majority is to the effect that the governor may make that sacred writ totally unavailing. The people further ordained that no citizen not in the military service should ever be called to answer before a military court for a civil offense. Yet the majority holds that any citizen may be subject to trial and condemnation before a military commission whenever the governor sees fit to displace the civil courts by a proclamation to that effect.

How can the majority decision in these cases and the former ones be upheld in the face of the constitution of this State? Hear some of its plain provisions again, and then say if the constitution may be departed from and a citizen not a soldier subjected to trial and punishment before a military commission for a civil offense:

> The provisions of the Constitution of the United States and of this State are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof under the plea of necessity, or any other plea, is subversive of good government and tends to anarchy and despotism. (Art. 1, sec. 3.)

The privilege of the writ of habeas corpus shall not be suspended. No person shall be held to answer for treason, felony, or other crime not cognizable by a justice unless on presentment or indictment of a grand jury. (Art. 3, sec. 4.)

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers. (Art. 3, sec. 10.)

The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of this State. (Art. 3, sec. 12.)

Trials of crimes, and of misdemeanors, unless herein otherwise provided, shall be by a jury of 12 men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials the accused shall be fairly and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense; and there shall be awarded to him compulsory process for obtaining witnesses in his favor. (Art. 3, sec. 14.)

The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay. (Art. 3, sec. 17.)

When we observe these provisions of our State constitution or look at that instrument as a whole, we see how clearly applicable to it are the words applied to the Federal Constitution by a preeminent authority:

There is nothing in that instrument to indicate that the guaranties which it affords for life or property are to cease on the occurrence of hostilities. A contrary design is manifested unmistakably with the utmost clearness. (Hare's American Constitutional Law, 963.)

But, says the majority, it was implied and presumed that these constitutional provisions were not always to be followed. (See syl. 2, in the cases of Nance and Mays, 77 S. E., 243.) What legal doctrine is this? When before has it been declared that express provisions of a constitution may be set aside by mere implication and presumption? From what does the implication and presumption arise? The majority says, from the provision which establishes a militia and gives the governor power to call out the same to execute the laws, suppress insurrection, and repel invasion, and from the inherent right of sovereignty to preserve itself. In other words, because the Constitution provides for the existence of a militia, it means that the militia shall have power to supplant the civil law. Yet the Constitution has said plainly that the militia should not supplant the civil law—should not try citizens for civil offenses and deprive them of the precaution of an indictment before a grand jury and the right to the judgment of their peers. Can the mere provision for a militia annihilate the other and more explicit provision? Does the one repeal the other? By every known rule of construction they must be made to stand together. True, a militia is provided for; but unmistakable restriction is placed on the use of that militia. Is it not within the power of a constitution to limit and restrict? Are not such instruments supposed to construct, mark out, and limit? Must the express restrictions as to the use of the militia give way merely because of the provision which brings the militia into existence? But, further, the majority says that there is a presumption that in the promulgation and adoption of the Constitution the people did not mean to abolish a generally recognized incident of sovereignty, the power of self-preservation of the State by its

military forces in cases of invasion, insurrection, and riot. If there ever existed a generally recognized incident of sovereignty whereby a State could deprive its own citizens of presentment and trial by jury for civil offenses and subject them to trial for such offenses before military courts, our people certainly did mean to abolish that incident, for they used explicit words sufficient to abolish the same. It can not be presumed that the people meant to retain military trial of its citizens for civil offenses, when they explicitly say that no such trial shall ever be had. No; the founders had good reasons to abolish it and to leave no room for implication or presumption to the contrary. The argument of the majority goes to this, the founders could not do away with that implication and presumption unless they abolished the militia itself. Having retained the militia, the majority would say, the makers of the Constitution retained trial of citizens by military courts regardless of the specific and direct words of those makers to the contrary. Such argument leads to palpable absurdity.

In consonance with the provisions of our constitution, the legislature has specifically provided for the militia to be used only in aid of the civil authorities when such a state of affairs exists as that disclosed by the record in these cases. (Code 1906, ch. 18, secs. 55–64.) Indeed throughout the whole military code the relation of the militia to the civil law is always apparent. Its existence and use for the enforcement of the civil law, not its own law, is clearly recognized. Nowhere is its independence of the civil law even hinted at. The militia is a citizen soldiery. It is not an imperial army. Nor is it at all in keeping with American traditions even to think of making it such, or giving it dominancy at any time to supplant the ordinary laws of the land. Why was not the true relation of the militia recognized for the enforcement of law in Cabin Creek district? What necessity existed for using the militia differently from the way the legislature has said it shall be used when such conditions exist as those disclosed in these cases? Why disregard the plain direction of the statute which says it shall be used in aid of the civil authorities? It is no answer to say that the legal method is insufficient. The lawmakers deemed it sufficient, and provided no other method. Can the governor renounce the wisdom of the lawmakers and assert his will through the militia against our own citizens as though they were foreign enemies?

Truly it would seem that the use of the militia in aid of the civil authorities is all sufficient for the quelling of any unlawful disturbance in a single magisterial district of this great State and for the bringing of all offenders to trial before the constitutional courts. But it is said that the governor's proclamation establishing other means can not be reviewed by the courts. Is the governor thus immune from the law? Can he, because of an assault and battery between two persons or the murder of one person by another, issue a proclamation of martial law and through the use of the militia order the offender to be imprisoned or hanged and the courts have no power in the premises? If he is to be the absolute judge of the necessity for establishing martial law in one case, why not in any case, though no necessity exists? That the illegal acts of the governor may be reviewed by the courts as well as those of any other officer certainly needs no argument. This court has declared a veto of the governor to be illegal and void. Acts of the legislature are set aside by the courts as illegal.

Remember, the writ of habeas corpus is always available in this State. Our constitution plainly says it shall be. It makes no exception even for invasion and rebellion, as most constitutions do. By that writ any unlawful imprisoning of a citizen may be reviewed. By it a governor's proclamation, if not warranted in law and in fact, must give way. That great writ of freedom can never rightly be proclaimed away in this State. Executive or even legislative acts can not suspend it.

My position in these cases, as in the Nance and Mays cases, is rested squarely on our own constitution and laws. Why go elsewhere for authority? But it is not wanting elsewhere. It is prevalent and pronounced in opposition to the majority holding.

In connection with what may be said by me in these cases my former dissenting opinion in the similar cases of Nance and Mays (77 S. E., 247) should be read as applicable, explanatory, and additional.

The argument that to preserve the life of the State the governor must be given such extreme and dominant power as the majority has accorded to him may be answered by asking one question: Is this great State in its death throes because of rioting and unlawful acts in a single magisterial district? If the State has become so impotent in its sovereign powers under the civil law as to be in danger of its existence because of mere private dissensions and disturbances in a small isolated district, it is time for patriotic citizens to arise. The State can not be preserved by a suspension of constitutional rights. Nothing will kill it quicker. The words of the Supreme Court of the United States on this line are most significant:

> It is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could well be said that a country, preserved at the sacrifice of the cardinal principles of liberty, is not worth the cost of preservation. (Ex parte Milligan, 4 Wall., 126.)

Nor does the suggestion that the civil courts, officers, and juries are inefficient sound well. That is the same excuse that is invariably given for suspending the Constitution and laws when a lynching takes place. Why were not the civil authorities aided by the militia, as the law directs? If this had been done, would they have been inefficient? It is mere assumption to say that they would have been. Their functions were supplanted. The militia, under proclamation of the governor, set up a court of its own, and denied all criminal jurisdiction of the civil courts and officers, even as to civil offenses committed before the proclamation. Say the civil authorities are inefficient. Do two wrongs ever make a right?

It may be claimed that the majority opinion only authorizes arrest and detention until the disturbances are suppressed. Why the extended argument and citation seeking to justify trials, sentences, and punishment by military commissions? What does the approval and reaffirmance of the holding in the Nance and Mays cases mean? The majority refused to discharge Nance and Mays from the penitentiary, thereby upholding their military sentences to that penal institution. Read again the syllabus to the opinion in those cases. There it is directly held that the militia may not only arrest and detain, but by military commission may try citizens and sentence them to the penitentiary for civil offenses amounting under the civil law only to misdemeanors. Moreover, read syllabus 2 to the majority opinion

herein. It holds that the civil power as to offenses is excluded by the military proclamation and that the usages of nations prevails over our own citizens. In fact, it holds that our citizens are to be dealt with as alien enemies. That the issue in these cases involved the question of trial, sentence, and punishment by military commission in the place of the civil courts can not be gainsaid when the petitions, writs, returns, and briefs are examined. That petitioners sought not discharge from custody, but freedom from military trial by an order of this court remanding them to the civil courts for trial their pleadings show. That the military authorities were claiming absolute jurisdiction to try, sentence, and punish petitioners and were denying all jurisdiction of the civil courts in the premises was charged by petitioners and not denied by the respondents. That charges and specifications accusing petitioners of civil offenses were pending before a military commission is shown by the respondents themselves in their returns. That immediately after the decision in these cases petitioners were put on trial before a military commission and by it tried for the civil offenses charged is common notoriety from the public press. That the military authorities claim the right to act absolutely independent of the civil authorities in the so-called military district and to try, condemn, sentence, and imprison in the State penitentiary for a specific term any citizen for a civil offense, whether connected with the disturbance between the mine owners and the miners or not so connected, is a fact pregnant from every part of the records in these cases and the former cases of Nance and Mays, particularly from the proclamations and military orders of the governor. That the military authorities have been and still are exercising such anomalous jurisdiction that they even deny that the sheriff of the county may enter the district which they have marked out and there serve the process of the civil courts is a matter of State history.

The issue was clear. It was this: Should the petitioners be remanded for trial to the military court claiming exclusive and final jurisdiction of the civil offenses charged against them and thus be put in jeopardy of conviction and confinement in the State penitentiary without presentment and trial by jury? This court should have promptly condemned the unwarranted procedure to which the majority subjected petitioners. It should have given notice to all that this State is a land of constitutional courts, not one of imperial military courts.

Petitioners were arrested in the city of Charleston on a warrant of a justice of the peace, a civil court, charging them with civil offenses, that of conspiring to inflict bodily injury on persons whose names were unknown, and other offenses. They were taken before the justice, within sight of the courthouse where the civil courts of the county were open and in the exercise of their powers. Instead of giving the accused preliminary examination, and upon the finding of probable cause holding them to answer the grand jury, the justice directed the special constables having them in charge, by indorsement on the warrant, to deliver them to the military authorities in the so-called military district. The exception of petitioners to such unknown procedure did not avail. They were so delivered and were about to be put on trial before a military commission for the same offenses charged before the civil court when the writs of habeas

corpus were awarded them. Though petitioners were arrested and brought before a civil court—the justice of the peace—that court in absolute disregard of their rights and the law governing it sent them to the military authorities in a distant part of the county. This illegal procedure alone entitled petitioners to be remanded to the civil courts. Yet it simply illustrates the extreme to which disregard of constitutional and legal procedure has run. Instead of recognizing the true order of the statute whereby a militia is to aid the civil authorities, the law is reversed, and the civil authorities are used to aid the military power. Verily indeed has the military power been made absolute, independent, and dominant in West Virginia.

Why resort is made to sections 6, 7, 8, and 9 of chapter 14 of the code one familiar with the record in these cases can not conceive. No reliance was placed on these sections by the military authorities. They were not content with the limited powers mentioned therein, for these sections do not provide for military trial and sentence. Nothing short of a court of their own and the sending of citizens to the penitentiary for specific terms without trial by jury will satisfy the military authorities. Besides, these sections provide only for the arrest of certain persons on a warrant or order issued by the governor. They were not invoked by the governor. He issued no warrant or order for the arrest of petitioners. If reliance had been made on these sections, the absence of the basic warrant or order of the governor would have entitled petitioners to discharge. Is not this elementary law? Again, these sections of the statute apply only to enemies of the State, to those who give aid, support, or information to the State's enemies, to those who conspire or combine together "to aid or support any hostile action against the United States or this State." These sections are made for public war, not for the mere private conflict as to which the State is not a party, but is only the great conservator of the peace through the civil law. An examination into the origin and history of these enactments, to say nothing of their direct words, will disclose that they were made for times when enemies seek to overthrow the government. (See Ordinances of the Wheeling Convention of 1861, pp. 7 and 8; code, 1868, ch. 14, secs. 5–9; acts, 1882, ch. 144, secs. 5–9.)

A clash between mine owners and miners can not be considered public war, and the participants dealt with as enemies of the State. True it is that in war the enemy, whether a foreign one or a rebel to whom the status of belligerent has been given, has no legal rights which those opposed to him must respect. But have either the mine owners and their guards on the one side, or the miners on the other, assumed the status of belligerency against the State? Because of warfare between themselves and violations of the law in relation thereto, has neither side any constitutional rights which the State is bound to respect? Nothing in the record justifies the conclusion that either the mine owners and their guards on the one hand, or the miners on the other, have lost their allegiance to the State by the unfortunate clash between them or by any other act. Neither faction has made war against the State. Each time the militia has been sent to the district, all has remained quiet. Chief Justice Marshall early defined what it is to make war:

> To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. (Ex parte Bollman, 4 Cranch, 75.)

Nothing even reminding one of treasonable purpose is involved in these cases. Yet the majority opinion deals with the citizens of the district as rebels. It deals with a part of Kanawha County as enemy country. In this it can not be sustained by reason of authority. Cabin Creek district has not seceded! The residents of that district are citizens of the State under its civil protection, though they may have violated the law. Because one violates the law, does he lose his legal rights? The guiltiest man, if he is not an enemy in public warfare directly against the State, is entitled to all rights as a citizen.

War, in public law, has, as is well known, a definite meaning. It means a contest between public enemies termed belligerents, and to the status thus created, definite legal rights and responsibilities are attached by international and constitutional law. War is thus sharply distinguished from a mere insurrection or resistance to civil authority. (Willoughby on the Constitution, sec. 730.)

The failure in the majority opinion to observe the sharp distinction between public war and civil disorder, between enmity against the State and individual enmity between citizens of the State, between rebels and mere violators of the law, between belligerent territory and territory retaining allegiance, accounts for the misapplication of the decisions, legislative enactments, and quotations relied on therein. An examination of those decisions, enactments, and quotations with this distinction in view will show how inapplicable they are. They relate to public war and to public enemies. We are not dealing with public war or with public enemies. With the exception of the Moyer cases and the Shortall cases, to which reference will be made later, the cases relied on for the majority relate to various questions growing out of public war. That which may be allowable by the usages of nations in a public war can not be applied as against citizens of a State engaged in civil disorder. (See Hare's American Constitutional Law, 922.)

The populace being loyal and the territory domestic, private rights of person and property still persist, though subject, as in all other cases, to the exercise of the police powers of the State. (Willoughby on the Constitution, sec. 732.)

Nor can the governor, by proclamation or otherwise, make that public war which in fact is not such. He can not install martial law in a time of peace, when every civil court of the State is open, under the guise of a proclamation of public war which in fact does not exist.

The existence of martial law does not in any way depend upon the proclamation of martial law. (Dicey on the Law of the Constitution, 545.) Indeed, it may be said that a State of the Union has not the constitutional power to create, by statute or otherwise, a state of war, or by legislative act or executive proclamation to suspend, even for the time being, all civil jurisdiction. (Willoughby on the Constitution, sec. 730.)

Military commissions have existed in public wars—in conquered enemy countries. But no military commission for the trial of citizens, usurping all criminal jurisdiction of the courts, has ever before been sanctioned or recognized as to a State militia in the quelling of domestic disorder. Indeed, the majority cites no adjudicated case in which such trial by military commission has been upheld even as to public war. In public wars military commissions have been installed in conquered foreign territory, or conquered rebellious territory, out

of the actual necessity arising from the fact that the courts were closed or were not in sympathy with the obligations of the conquering country to society. They properly pertain nowhere else. Never before has any State of the Union disowned its civil courts and ordained that military commissions shall take their place. No such thing has been done anywhere since the declaration of the petition of right. Yet with us it has been done in the face of the fact that nothing whatever prevented the taking of offenders, arrested by the militia in the quelling of disorder, before our civil courts and there subjecting them to trial in constitutional form. The way to the courthouse was unobstructed. If the militia could arrest offenders and secure witnesses for its own assumed court, it could do so as readily for the legally organized courts. Nothing so readily establishes respect for the law as respect for it by those in power. The reverse is equally true.

The effort in the majority opinion to sustain military commissions by asserting that the opinion in the Milligan case and the writings of Lieber, Ballantine, and others distinguished between pacific territory and the theater of actual war, can not avail with anyone who fully reads the opinion and writings referred to. Neither the Milligan opinion nor the writings of Lieber, Ballantine, and others uphold arbitrary military trial on any such distinction, or at all. They do distinguish between territory in rebellion seeking to overthrow the Government and territory that has not lost its allegiance—between enemies engaged in public war and citizens violating the law. Read them. For instance, Ballantine says:

> What may be done on the theater of actual military operations when our Armies are advancing, retreating, or operating within our own territory depends upon military necessity for the public defense, and is to be judged by the circumstances and exigencies of the particular case, which may be reviewed by the courts, irrespective of military proclamations. Citizens can not be arrested, deported, imprisoned, or put to death by arbitrary military authority when war is raging any more than during a state of peace, and the fact that the courts are closed or that a proclamation of martial law has been made will not justify a resort to the arbitrary unregulated exercise of military power.

The kind of martial law which the majority of this court upholds is unknown in England and the United States. All the great writers on constitutional law so assert.

Mr. Dicey, the renowned English author, after quoting the French law, which allows constitutional guaranties to be suspended by proclamation, says:

> We may reasonably, however, conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris or some other part of France is declared in a state of siege, and, to use a significant expression known to some continental countries, "the constitutional guaranties are suspended." We shall hardly go far wrong if we assume that, during this suspension of ordinary law, any man whatever is liable to arrest, imprisonment, or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war. * * * Now, this kind of martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. (Law of the Constitution, 288.)

The leading American authority of the present day says:

> There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military is substituted for civil law. So-called

declarations of martial law are, indeed, often made, but the legal effect of these goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts that will in any way render more difficult the restoration of order and the enforcement of law. During the time that the military forces are employed for the enforcement of the law, that is to say, when so-called martial law is in force, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the citizen are suspended. The relations of the citizen to his State are unchanged. (Willoughby on the Constitution, sec. 727.)

The majority opinion repeatedly appeals to In re Moyer (35 Colo., p. 159) and its sequel, Moyer *v.* Peabody (212 U. S., p. 78). These decisions involve no question of trial by military commission. They go no further than to justify an arrest made by military authorities in the suppressing of civil disorder. They plainly negative any recognition of military trial and punishment for an offense in connection with the civil disorder. In the instance to which they relate the governor of Colorado claimed no right to try and punish by military rule. He was not an advocate of military commissions. His return to the writ of habeas corpus expressly avers that Moyer was to be given over to the civil authorities for trial. Here are its words:

That it is his purpose and intention to release and discharge petitioner from military arrest as soon as the same can be safely done with reference to the suppressing of the existing state of insurrection in the county, and then surrender him to the civil authorities to be dealt with in the ordinary course of justice after such insurrection is suppressed.

And in disposing of the case the chief justice of Colorado lends no recognition to military trial for offenses connected with the civil disorder. Here is what the chief justice, speaking of Moyer, says in the opinion:

He is not tried by any military court or denied the right of trial by jury, neither is he punished for violation of the law nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county, to be dealt with in the ordinary course of justice and tried for such offense against the law as he may have committed.

In the review of this same arrest in the suit of Moyer *v.* Peabody, supra, Mr. Justice Holmes says:

Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.

He does say that—

public danger warrants the substitution of executive process for judicial process.

But his remarks must be interpreted in the light of the case before him. He could not have meant executive process to try and punish for a civil offense, for that question was not involved in the case. He meant executive process to arrest, not executive process to try and punish. The former was embraced in the case; the latter was not. Besides, we have seen that he plainly said that such arrests were not for punishment, but to prevent hostile power. No; Colorado had not gone

to the extent of disowning and supplanting her civil courts by military courts. The governor of that State disclaimed any such purpose, but directly answered that he was only acting in aid of the civil authorities. But with us the contention of the governor in every case has been that his military court may make convicts out of citizens. And each decision of the majority of this court, viewing the same from the issues involved, to say nothing of the written opinions, has held that the governor may thus cast upon citizens the stigma of having been confined in the penitentiary, though under the civil law the offense involved may have been only a petty misdemeanor. If the majority meant to go no further than these Moyer cases go, why has it not long ago said to the military authorities: You may arrest and detain for the purpose of preventing hostile power, but you can not by military court send offenders to the penitentiary, as the governor has ordered. If it meant to go no further, why has it refused to discharge Nance and Mays from penitentiary sentences? If it meant to go no further, why has it plainly remanded the present petitioners to military trial and the hazard of punishment in the penitentiary thereby?

Whether such length of detention as that involved in the Moyer cases may prevail in West Virginia, where our constitution has no exception ever allowing a suspension of the privilege of the writ of habeas corpus, need not now be discussed.

Plainly the case of Commonwealth *v.* Shortall (206 Pa. St., 165) is no authority to sustain military courts. It involves no question of trial by a military court. It no more than defines the view of the Supreme Court of Pennsylvania as to what military acts in the quelling of civil disorder may be excused on the ground of necessity. There a soldier on duty in a disturbed district of the State, acting under military orders for the suppression of the disturbances, shot one who did not obey his command to halt. It was held that the circumstances justified the act. What has this to do with the supplanting of civil trial by military trial? At any rate, see the adverse criticism of that decision in 65 L. R. A., 207.

Moreover, it may be confidently asserted that none of the adjudicated cases cited by the majority, except those criticized or sought to be distinguished by it, have any more relations or come any nearer to the question of military trial than do the Moyer cases and the Shortall case. They are wide of the mark. On the other hand, such military trial as that fostered by the majority has received the condemnation of many courts—the clarion denouncement of the highest tribunal in this land:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. (Ex parte Milligan, 4 Wall., 120.)

In addition to the references made in my dissenting opinion in the Nance and Mays cases, supra, the following, by no means all, will be found enlightening:

Willoughby on the Constitution (ch. 52); Dicey on the Law of the Constitution (280–290, 538–555); Hare's American Constitutional Law (lecture 44); Story on the Constitution (5th ed., sec. 1342, and

note thereto); Annals of Congress (9th Cong., 2d sess., pp. 402–424, 502, et seq.); Johnson *v.* Duncan (3 Martin, 530; 6 Amer. Dec., 673); Ex parte Merryman (Fed. Cas., 9487); In re Egan (5 Blatch., 319); Ex parte Benedict (Fed. Cas., 1292); Ex parte Henderson (Fed. Cas., 6349); Johnson *v.* Jones (44 Ill., 142); In re Kemp (16 Wis., 382); Griffin *v.* Wilcox (21 Ind., 370); Jones *v.* Seward (40 Barb., 563); Congressional Globe (38th Cong., 2d sess., pp. 1421–1423); Franks *v.* Smith (142 Ky., 232); 1 Cooley's Blackstone (413); 6 Great American Lawyers (233–254); Edinburgh Review (January, 1902, pp. 79–105).

Is it not a spectacle for the notice of a people who rest their liberties on our form of constitutional government that in one of the States of the Union a section thereof is given over to an independent military rule which admits no power of the civil courts to enter and which claims cognizance as against all found therein of every imaginable accusation, from mere words spoken to perjury, rape, or murder? Does the peaceful mountain farmer residing therein realize that he is subject not to the civil law but to the will of a military commander who may hear no excuse as to any accusation against him? Do citizens of this Republic passing through that district on one of the great transcontinental lines of railway realize that for a time they are subject absolutely to the will of one man? It is no excuse to say that the supreme military authority will not be exerted against such. It is bad enough to say that a majority of this court has held that such authority exists. The majority has held that martial law—the law and usage of public war—can and does exist in that district. Then that martial law—

> overrides and suppresses all existing civil laws, civil officers, and civil authorities by the arbitrary exercise of military power; and every citizen or subject—in other words, the entire population of the country within the confines of its power—is subject to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge, and executioner. (In re Egan, 5 Blatch., 321.)

The persistency with which a military rule heretofore unknown has been sanctioned has demanded this second protest on my part. Unfortunate indeed is the generation that forgetteth the memories of its fathers.

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